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(24.559)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 350.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

*vs.*

R. P. WALL, AS ADMINISTRATOR OF THE ESTATE OF  
R. J. WALL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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a No. 3439.

In the Supreme Court of the State of Montana.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased,  
Respondent,  
v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
Appellant.

Appearances:

Messrs. Hartman & Hartman and Gunn, Rasch & Hall, Attorneys  
for Appellant.

Walter Aitken, Esq., Attorney for Respondent.

Transcript on Appeal from the District Court of the Ninth Judicial  
District of the State of Montana in and for the County of  
Gallatin.

Filed January 17, 1914.

JOHN T. ATHEY, Clerk.

1 In the Supreme Court of the State of Montana.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased,  
Respondent,  
v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
Appellant.

Appearances:

Messrs. Hartman & Hartman and Gunn, Rasch & Hall, Attorneys  
for Appellant.

Walter Aitken, Esq., Attorney for Respondent.

Transcript on Appeal from the District Court of the Ninth Judicial  
District of the State of Montana in and for the County of  
Gallatin.

2 In the District Court of the Ninth Judicial District of the  
State of Montana in and for the County of Gallatin.

R. J. WALL, Plaintiff,  
vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Complaint.*

Plaintiff complains and alleges:

I.

That the defendant now is, and at all the times hereinafter mentioned  
has been, a railway corporation organized and existing under

and by virtue of the laws of the State of Wisconsin, and a common carrier of merchandise and livestock by means of its own and connecting lines of railway between the town or station of Belgrade, Montana, and points in other states, and especially to the City of Chicago, State of Illinois.

## II.

That on the second day of January, 1912, the plaintiff delivered to the defendant, as such common carrier, at Belgrade, Montana, and defendant then and there received from plaintiff, one hundred and one (101) head of fine, fat beef cattle, all of which were in sound and first-class marketable condition, for transportation and delivery to Wood Brothers, the agents of plaintiff, at Union Stockyards, City of Chicago, as aforesaid; and it thereupon became the duty of defendant as such common carrier, to carry and convey, safely, securely and expeditiously and within a reasonable time thereafter, and without unnecessary delay, the said cattle, from the said town or station of Belgrade, Montana, to said City of Chicago; all in consideration of a certain reasonable hire and reward to be paid by plaintiff to the said defendant in that behalf, and in accordance with the published rates of said defendant for such service.

## III.

That if defendant had faithfully performed its duty as a common carrier, as aforesaid, in the transportation of the said cattle, they would have been delivered to the agents of plaintiff in the City of Chicago, as aforesaid, not later than the 9th day of January, 1912, in accordance with the plans and purposes of plaintiff.

## IV.

That, as plaintiff is informed and believes, and therefore alleges, the defendant, disregarding and neglecting its duty as a common carrier, as aforesaid, wrongfully and negligently delayed the transportation of said cattle at Bozeman, Montana; at Livingston, Montana; at Billings, Montana; at Dickinson, North Dakota; at 4 Fargo, North Dakota; between Fargo, North Dakota, and Staples, Minnesota; and between Staples, Minnesota, and St. Paul, Minnesota; between St. Paul, Minnesota, and Montgomery, Illinois, and between Montgomery, Illinois, and Chicago, Illinois; so that instead of being delivered to the agent of plaintiff at Union Stockyards, in the City of Chicago, as aforesaid, early in the morning of January 9th, 1912, said cattle did not reach said agent until early in the morning of January 15th, 1912, or six days after they would have been delivered had the defendant not been neglectful of its duty as a common carrier, as aforesaid. That between the towns or stations of Fargo, North Dakota, and St. Paul, Minnesota, the defendant, wrongfully, negligently, and in violation of law, kept the said cattle confined in the cars in which they were being transported for 38 hours continuously; and between the towns or stations of St. Paul, Minnesota, and Montgomery, Illinois, also so continuously and in violation of law, kept said cattle confined in the cars in which

they were being transported for a period of 38 hours or more. That for the transportation of said cattle the defendant wrongfully and negligently failed and neglected to provide good and sufficient motive power, and to properly manage and run its trains, and to provide proper and adequate stockyards facilities for unloading, feeding, watering and resting said cattle, and unnecessarily sidetracked said cattle for long periods, and failed, neglected and delayed to provide necessary and proper switching facilities, motive power and crews so that said cattle could, from time to time, be unloaded, rested, fed, watered and otherwise cared for by plaintiff.

## V.

That by reason of the aforesaid wrongful and negligent acts and omissions of the defendant, the said cattle were greatly reduced in flesh and weight, gaunted, shrunken and emaciated in appearance, to the damage of the plaintiff in the sum of Twelve Hundred Nine and 20/100 (\$1,209.20) Dollars, being forty cents per hundred-weight loss on account of the appearance of said cattle when placed on the market, and 14,700 pounds shrinkage in weight at an average of \$5.36 per hundred-weight.

## VII.

That by reason of the aforesaid wrongful and negligent acts and omissions of the defendant three of said cattle died en route, to the damage of plaintiff in the sum of one hundred fifty and 13-100 (\$150.13) dollars.

## VII.

That by reason of the aforesaid wrongful and negligent acts and omissions of defendant was obliged to, and did, buy hay for the feed and care of said cattle en route, more than he otherwise would have been obliged to do, to the value of \$145.50, and was thereby damaged to that extent and amount.

Wherefore Plaintiff demands judgment against the defendant for the sum of fifteen hundred four and 83-100 (\$1,504.83) dollars, damages, and the costs of this action.

WALTER AIKEN,  
*Attorney for Plaintiff.*

(Duly verified.)  
(Filed July 12, 1912.)

(Title of Court and Cause.)

*Demurrer.*

Now comes the defendant in the above entitled action, and demurs to the complaint on file therein, upon the ground:

1. That the same does not state facts sufficient to constitute a cause of action.

GUNN, RASCH & HALL,  
*Attorneys for Defendant.*

(Filed August 7, 1912.)

(Title and Court — Cause.)

Court Minutes.

*Order Overruling Demurrer to Company.*

The demurrer to complaint is submitted to the Court without argument and overruled. Defendant granted 20 days' time to answer.

(Title of Court and Cause.)

*Answer.*

Now comes the defendant and for answer to plaintiff's complaint in the above entitled action:

7        1. Admits the allegations contained in paragraph 1 thereof.

2. Admits that on the 2nd day of January, 1912, the plaintiff delivered to the defendant as such common carrier at Belgrade, Montana, and defendant then and there received from plaintiff one hundred and one head of cattle for transportation and delivery to Wood Brothers, the agents of plaintiff at the Union Stock Yards, Chicago, Illinois; and alleges that it thereupon became the duty of defendant as such common carrier to carry and convey the said cattle from the said town of Belgrade to the usual point on its line for delivery to a connecting line of railroad over which the same might pass in reaching their destination at said City of Chicago, all in accordance with and upon the terms and conditions contained in a certain special contract in writing entered into between said plaintiff and defendant upon a sufficient consideration and under a special and reduced rate of carriage, which contract was duly signed by said plaintiff and an agent of defendant and accepted by said plaintiff at the time said cattle were so delivered to said defendant. That a copy of said contract is hereto attached, marked Exhibit A and made a part of this answer. That all of said cattle were received for carriage under the terms of said contract and not otherwise by this defendant.

3. Denies each and every allegation contained in paragraphs 3, 4, 5, 6 and 7 of said complaint.

8        4. Denies each and every allegation contained in said complaint not hereinbefore specifically admitted or denied.

For a further and separate defense to said complaint defendant alleges:

1. That the cattle shipped by plaintiff as alleged in said complaint were delivered by said shipper to said defendant on the second day of January, 1912, for carriage by defendant and connecting carriers to Chicago, Illinois, and were then received and accepted by said defendant for carriage to such destination upon the terms and conditions stated in a special contract in writing entered into between said shipper and this defendant upon a sufficient consideration and

under a special and reduced rate of carriage and said contract was duly signed by the said shipper and by an agent of the defendant and accepted by said shipper at the time the said cattle were delivered to said defendant. That a copy of said contract is hereto attached, marked Exhibit A and made a part of this answer. (Exhibit A appears at the end of transcript as Defendant's Exhibit 1.) That all of said cattle were received for carriage under the terms and conditions of such special contract and not otherwise by this defendant.

2. That section 7 of an act of congress of June 10, 1910, entitled "an act to create a commerce court and to amend the act entitled 'an act to regulate commerce,' approved February 4, 1887, as 9 heretofore amended, and for other purposes," contains the

following provisions, to-wit: "And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices, affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms."

The said contract for the transportation of said stock from the state of Montana to Chicago, state of Illinois, entered into as aforesaid, contains the following provision, to-wit: "As a condition precedent to the shipper's right to recover any damages for delay in transit or for loss or injury to any of the stock, the shipper must

give notice in writing of his claim therefor to some officer or 10 station agent of the company before the stock has been removed from the place of destination or mingled with other stock, \* \* \*. The terms of this contract shall apply to the transportation by each carrier on any portion of the route to destination as to its own line."

That by virtue of, and pursuant to, the authority conferred upon it by said act of congress, set out above, defendant established, made and prescribed the terms and regulations contained in said contract, and quoted above, as just and reasonable terms and regulations for the handling, transporting and delivery of interstate shipments of live stock.

That chapter 138 of the session laws of the state of Montana of 1909, in so far as it affects or limits the provisions of said contract, set out above, is in conflict with said act of congress, as being an attempt to regulate and limit contracts relating to interstate com-

merce, and authorized by said act of congress, and is, therefore, void and without force and effect.

3. That no notice in writing, or otherwise, of any claim for damages for delay in transit, or for loss or injury to said cattle, or any of them, was given by said shipper, or at all, to any officer or station agent of said defendant, or to any officer or station agent of the connecting carrier, until long after said cattle had been removed from the place of destination of said shipment and mingled with  
11 other stock; that by reason of such failure of said shipper to give said notice, in accordance with the terms and conditions contained in said contract, said plaintiff is estopped from recovering any damages for delay in transit, or for loss or injury to said cattle, or any of them.

For a second and further and separate defense to said plaintiff's complaint defendant alleges:

1. That the cattle shipped by plaintiff as alleged in said complaint were delivered by said shipper to said defendant on the second day of January, 1912, for carriage by defendant and connecting carriers to Chicago, Illinois, and were then received and accepted by said defendant for carriage to such destination upon the terms and conditions stated in a special contract in writing entered into between said shipper and this defendant upon a sufficient consideration and under a special and reduced rate of carriage and said contract was duly signed by the said shipper and by an agent of the defendant and accepted by said shipper at the time the said cattle were delivered to said defendant. That a copy of said contract is hereto attached, marked Exhibit A, and made a part of this answer. That all of said cattle were received for carriage under the terms and conditions of said special contract and not otherwise by this defendant.

2. That any damage or delay that said cattle may have suffered during said shipment arose from and was incident to the inclemency of the weather and the action of the elements during said period and not otherwise and was a risk assumed by the plaintiff under the terms and conditions of said contract.

Wherefore defendant, having fully answered, prays to be hence dismissed with its just costs.

GUNN, RUSCH & HALL,  
*Attorneys for Defendant.*

(Duly verified.)

(Exhibit A referred to in Answer is set out in Bill of Exceptions as Defendant's Exhibit 1.)

(Filed Sept. 26, 1912.)

(Title of Court and Cause.)

*Demurrer to Answer.*

Now comes the plaintiff in the above entitled action and demurs to the answer of the defendant on file herein and as ground for demurrer alleges:

1. That the said answer, and the whole thereof, is insufficient in law upon the face thereof, to constitute a defense.
2. That the first "further and separate defense" set forth in said answer is insufficient in law upon the face thereof.
3. That the second further and separate defense" set forth in said answer is insufficient in law upon the face thereof.

WALTER AITKEN,  
*Attorney for Plaintiff.*

(Filed Oct. 11, 1912.)

13

(Title of Court and Cause.)

*Court Minutes—Saturday, Nov. 16, 1912.*

The plaintiffs demurrer to the answer of the defendant is submitted to the court without argument and by the court overruled, and the plaintiff is given 20 days to reply.

(Title of Court and Cause.)

*Reply.*

Comes now the plaintiff in the above entitled action and replying to the answer of the defendant on file herein, admits, denies and alleges as follows:

1. As to the allegations of Paragraph 2 of defendant's answer, plaintiff admits that he signed and executed the contract in writing, being Exhibit A of defendant's answer, but alleges that the said contract was signed after the plaintiff had received, accepted and loaded, said cattle for shipment and without regard to said contract in writing; and that the signing of said contract by plaintiff was regarded by him as a mere formality and was not intended by him to operate in any way to relieve plaintiff from its common law liability to him as a common carrier of the livestock theretofore, and before the signing of said contract, delivered by plaintiff to defendant for shipment and accepted by it without any special restrictions whatever. Plaintiff denies that said cattle were received and accepted by plaintiff under a special and reduced rate of carriage or under any rate other than the usual regular and published rate for such service or at any other or different rate than would have been charged by defendant for such service if said contract in writing had not been executed, and plaintiff alleges that he paid to defendant the full, usual and regular published rate for such service.

As to the provision of said contract in writing limiting the liability of defendant to damage occurring on its own line, plaintiff alleges that such provision is contrary to the provisions of Section Twenty of an Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended January 29, 1906, which reads as follows:

"That any common carrier, railroad, or transportation company

receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipts, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of  
15 lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose lines the loss, damage or injury shall have been sustained the amount of such loss, damage, or injury, as it may be required to pay the owners of such property as may be evidenced by any receipt, judgment, or transcript thereof,"

and therefore void and of no effect and not binding on plaintiff.

2. Replying to the first "further and separate defense of defendant as set forth in its said answer, plaintiff admits that the cattle were delivered to defendant on the 2nd day of January, 1912, for carriage to the agent of plaintiff at Chicago, Illinois, but denies that they were received and accepted by defendant under the contract in writing set forth in defendant's answer, but alleges the defendant received and accepted, and loaded for shipment, said cattle, before said contract in writing was executed; and plaintiff denies that there was any special or reduced rate of carriage granted by defendant to plaintiff as a consideration for the execution of said contract in writing or that any rate for the carriage of said cattle other than the usual and customary regular and published rate was granted to plaintiff. Plaintiff alleges that there was  
16 no other or further consideration for the execution of said contract in writing by him than his desire that the cattle, after having been received by defendant and loaded into its cars, go forward to their destination as rapidly as possible and without unnecessary and unusual delay. That plaintiff did not read said contract in writing and did not understand, nor was it represented to plaintiff by defendant, nor by any one for defendant, that if plaintiff would execute said contract he would receive a special and reduced rate; and plaintiff denies that he received such alleged special and reduced rate or any rate other than the usual, regular and published rate charged for such service by defendant regardless of any special contract; and plaintiff alleges that if a special and reduced rate of carriage for said cattle was to be the consideration moving to him from defendant for the execution of said contract in writing, then such consideration wholly failed and was never received by plaintiff, but plaintiff paid to defendant the full, usual, customary and regular published rate for the carriage of said cattle from Belgrade, Montana, to Chicago, Illinois.

Plaintiff admits that Section 7 of an Act of Congress of June 10, 1910, entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,'" approved February 4, 1887, as heretofore amended and for other purposes,

contains the provisions set forth in Paragraph 2 of defendant's first "further and separate defense," but plaintiff denies that pursuant to said Act of Congress defendant established, made and prescribed the terms and regulations contained in the contract in writing of which defendant's Exhibit A is a copy, or any of them, and alleges that the form of said special contract (defendant's Exhibit A.) and all the provisions thereof were adopted and used by defendant long before said Act of Congress was passed and approved, and without any regard thereto. Plaintiff denies that the provision in said contract in writing (defendant's Exhibit A) to-wit: "As a condition precedent to the shipper's right to recover any damages for delay in transit or for loss and injury to any of the stock, the shipper must give notice in writing of his claim therefor to some officer or station agent of the company before the stock has been removed from the place of destination or mingled with other stock \* \* \* The terms of this contract shall apply to the transportation by each carrier on any portion of the route to destination as to its own line, "is a just and reasonable rule or regulation; but alleges that the same is unreasonable, unjust, burdensome, against the policy of the law, and contrary to the express provisions of Chapter 138 of the Session Laws of the State of Montana, for 1909. Plaintiff denies that the said Chapter 138 of the Session Laws of the State of Montana for 1909, in so far as it affects or limits the provisions of

said contract. (Defendant's Exhibit A) or in any way, or at all, is in conflict with the Act of Congress referred to in defendant's answer, or with any Act of Congress. Plaintiff admits that he did not comply with the provisions of said contract relating to the time of notice, as aforesaid, but alleges that he filed written notice of his claim with defendant within 12 days after the said loss and damage was determined, which was a reasonable time; that defendant acknowledged receipt of said written notice on January 31, 1912, and again on March 28, 1912, and at no time did defendant give plaintiff notice or intimation, in any way, that it relied upon the provision of said special contract (Defendant's Exhibit A) relating to the time of notice of claim, and defendant thereby waived the same.

3. Replying to defendant's second further and separate defense set forth in the said answer, plaintiff admits that the cattle shipped by plaintiff as alleged in the complaint were delivered by said shipper to said defendant on the second day of January, 1912, for carriage by defendant to Chicago, Illinois, and denies each and all of the other allegations of said "second further and separate defense."

4. Denies each and every allegation of new matter in said answer contained which has not hereinbefore been specifically admitted or denied.

Wherefore, plaintiff having fully replied to the answer of defendant  
19      prays judgment in accordance with the prayer of his complaint.

WALTER AITKEN,  
*Attorney for Plaintiff.*

Duly verified.  
(Filed Dec. 4, 1912.)

(Title of Court and Cause.)

*Verdict.*

We, the jury in the above entitled case find the issues in favor of the plaintiff and against the defendant, and fix his damages at \$879.60 *dollars.*

FRANK W. MACHEMER, *Foreman.*

Dated this 6th day of March, A. D., 1913.  
(Filed March 6, 1913.)

(Title of Court and Cause.)

*Judgment on Verdict.*

This action came on regularly for trial on the third day of March, 1913. The parties appeared in person and by their attorneys, Walter Aitken, Esq., counsel for the plaintiff; and E. M. Hall, Esq., and Hartman & Hartman, attorneys for the defendant.

A jury of twelve persons was regularly impaneled to decide said action. The witnesses on the part of the plaintiff and the defendant were sworn and examined. After hearing the evidence, the instructions to the jury, and the arguments of counsel, the jury 20      retired to consider of their verdict and subsequently, returned into Court, with the verdict signed by the foreman, and being called, answered to their names and say:

We, the jury, in the above entitled action, find the issues in favor of the plaintiff and against the defendant, and fix his damage at \$879.60.

(Signed)                    FRANK W. MACHEMER, *Foreman.*

Dated this sixth day of March, A. D., 1913.

Wherefore, by virtue of the law and the premises aforesaid, it is Ordered, Adjudged and Decreed that the plaintiff do have and recover of and from The Northern Pacific Railway Company, a corporation, the defendant in said action, the sum of eight hundred seventy nine and sixty 60-100 dollars (\$879.60), together with his costs in said action expended amounting to \$78.30, a total sum of \$957.90 and interest thereon at the rate of eight per cent (8%)

per annum from this date; and that the plaintiff have execution therefor against the property of the said defendant.

Dated this 6th day of March, 1913.

BEN B. LAW, Judge.

(Filed March 6, 1913.)  
Entered March 6, 1913.

(Title of Court and Cause.)

Friday, Sept 26, 1913.

*Order of Substitution and Overruling Motion for New Trial.*

21 On suggestion of counsel for plaintiff the death of the plaintiff since judgment is noted in record and on motion of counsel for plaintiff R. P. Wall, Administrator of the Estate of R. J. Wall, deceased, is substituted as party plaintiff with authority to litigate the cause to its final termination. Thereupon defendants' motion for new trial is by agreement of counsel in open court submitted without argument and the court being duly advised does now overrule said motion and hereby denies application for new trial. To which ruling of the court the defendant by its counsel duly excepts.

(Title of Court and Cause.)

*Bill of Exceptions.*

Be it remembered; That this cause came on regularly for hearing on Monday, the 3rd day of March, 1913, before the Honorable B. B. Law, Judge of the Ninth Judicial District Court, sitting with a jury, regularly empanelled.

Whereupon the following proceedings were had and done:

R. J. WALL, a witness produced upon behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. AITKEN:

My name is Robert J. Wall.

Q. Where do you reside, Mr. Wall?

22. By Mr. HALL: At this time we make the formal motion, or rather object to the introduction of any evidence in this case on the ground that the complaint does not state facts sufficient to constitute a cause of action.

By the COURT: Overruled; to which ruling of the Court the defendant duly excepts.

A. Belgrade is my postoffice.

My occupation is stock raising, raising stock and farming. I

run my stock on Sixteen Mile Creek, principally, in the summer time. I have been engaged in the stock business twenty-seven years, in Gallatin County. I mean by stock, horses and cattle—principally cattle. I have been shipping stock, I think, about twenty years—that is, cattle. I have shipped to Chicago, over the Northern Pacific road mostly. I recall the occasion of my delivering one hundred head of beef cattle to the Northern Pacific Railway Company in Belgrade on January 2, 1912. As to how I came to make that shipment, it was because I generally ship to Chicago. I do not inquire of the company or any of its agents before making the shipment as to cars. I ordered cars. We started to load these cattle about 10 o'clock in the forenoon and got through along towards about half past eleven or along there sometime, or twelve o'clock. I should judge that these cattle started on their journey about two o'clock, I am not positive about that; on the afternoon of the second. Charlie Hansen and Chris Hansen,  
23 two brothers, accompanied these cattle, this shipment as my agents. They were employees of mine. I helped them load these cattle. I did not accompany the shipment myself.

Q. Mr. Wall, in the light of your twenty-seven years' experience as a cattleman what have you to say as to the quality of that shipment of cattle as compared with ordinary shipments of beef cattle which you have made.

By Mr. HALL: There is no dispute in the cattle as to the character of the cattle.

By the COURT: Mr. Wall alleges that the cattle were in first class condition and there is no dispute about that.

By Mr. HALL: We don't deny but what they were.

By Mr. AITKEN: We want to show that they were extra fine.

By the COURT: There is no dispute about the condition of the cattle as alleged in the complaint.

By Mr. HALL: We admit that the cattle were in good condition.

Mr. AITKEN: I don't think they do admit that—they simply say they admit the receipt of the cattle, but don't admit their condition.

By Mr. HARTMAN: We will withdraw the objection then.

Q. What were they like?

A. They were the best cattle I have ever shipped since I  
24 have been shipping because they were fed so much more than any other bunch I have ever had; they were the best bunch of cattle I ever saw loaded by myself or anybody else in Belgrade.

There were forty-three steers in that bunch of cattle, and fifty-one cows. There were two bulls in the shipment. One of the bulls belonged to the Hansen brothers and was shipped under my name. In the light of my twenty-seven years' experience as a cattleman in Montana, I should say that the average weight of those steers at the time they left Belgrade couldn't have been less than 1425 to 40 pounds—some place in that neighborhood; that is my estimate on them. The average weight of the cows comprising that shipment when they left Belgrade I would naturally think would be 1300 anyhow, and the two bulls would have weighed in my estimation twenty-eight or nine

hundred—somewhere along there, the two of them together. One of the bulls was larger than the other, but this estimate of mine is as to the aggregate weight of the two bulls. I couldn't really tell exactly how often I have shipped stock to Chicago over the Northern Pacific Railroad, but I shipped all the cattle I have raised for the last twenty years over the Northern Pacific Railroad with the exception of a few shipments I have made over the Milwaukee—not many times—there might have been one or two years I didn't ship any on account of low prices or something like that. There couldn't 25 have been over three years that I have missed shipping over the Northern Pacific during that time, three years out of the twenty years that I have been shipping cattle. The average number of shipment—with reference to the car loads, has been from three to seven car loads—I have shipped as high as seven car loads at one time. The average length of time that it has taken to carry these shipments of from three to seven car loads of cattle from Belgrade to Chicago is about six days. It has never been longer than six days that I know of, no sir, not that I can remember. I can't tell that it has ever been any less than six days, it might have been some less, but not much. I have never shipped a full train load of cattle, but I have shipped with a full train, of course I have done that several times, that is with other parties. I have never shipped a full train load of cattle myself. I have made these shipments generally from October to February. I have made shipments a great deal later in the season than this one; I have made them in February, but not any great amount. I have made shipments a great deal in cold weather; I wasn't on the road myself; a great many times like this time I have sent men with them. I have never gone along over three times myself—Not over five times anyway myself. Before I loaded these cattle at Belgrade on January second I had a conversation with the agent there as to the run they were likely to get. The understanding I had when we loaded the cattle was that they were 26 to be loaded and shipped to Billings and catch a stock train there.

By Mr. HALL: We object to this testimony upon the ground that a written contract was entered into with the agent there at Belgrade for the shipment of this stock, which is admitted by the plaintiff and we object to any oral testimony here to vary the terms of that written contract.

By Mr. AITKEN: We are not seeking to vary the terms of the written contract—there is nothing in the contract that shows when they shall be shipped.

The COURT: Overruled; to which ruling of the Court the defendant duly excepts.

Q. Mr. Wall when you have made shipments of cattle prior to this one have you made them with any understanding as to the kind of run you would get?

A. No, sir.

By Mr. HARTMAN: We object if the Court please; the understand-

ing he might have had on former shipments would not in any way control the written agreement made for this shipment.

By the COURT: He has answered the question—it is in the record—I won't pass on the objection as it stands.

By Mr. HARTMAN: If he answers it that way I won't insist on the objection.

Q. Did you ship this cattle on January second expecting  
27 that they would be placed upon a special stock train at Billings?

Q. Yes, sir.

By Mr. HARTMAN: We object—the cattle were shipped under a special written contract; what expectancy the shipper may have had is not mentioned in the written contract and it is immaterial in that it tends to contradict or vary the terms of the written contract or agreement.

By the COURT: The witness answered the question before the objection was made.

By Mr. HARTMAN: We move to strike out the answer until your Honor passes on the objection; we are going to object to any testimony showing an oral agreement between the agent and the shipper which is not contained in the written contract.

By the COURT: Sustain the motion to strike out the answer until the objection is passed upon.

By Mr. HARTMAN: There is no allegation in the complaint that would justify the admittance of such testimony as sought in that question.

By the COURT: Overrule the objection at the present time. To which ruling of the Court the defendant duly excepts.

(Question read by stenographer.)

A. Yes sir, I did.

Q. Was that expectation indulged in pursuance to the representations made by the agent?

By Mr. HALL: We object on the ground that these cattle were shipped as appears by the undisputed allegations of the complaint and answer under special written contract and that the question seeks to contradict and vary—contradict or vary and add to the terms of that contract by oral testimony and there is no allegation in the complaint justifying such an attack upon the written contract nor is there such an attack in the reply.

By the COURT: I think under the authority of Nelson vs. Great Northern Railroad that I will have to admit that evidence; to which ruling of the Court the defendant duly excepts.

By Mr. HALL: We make the same objection to all rulings made to all questions pertaining to vary the terms of the written contract or agreement.

Q. (Question read.)

A. I don't understand that.

Q. I will simplify that question. Why did you expect that they would be placed on a special stock train Mr. Wall?

A. Why because Mr. Diefenderfer told me when I first spoke about it—

By Mr. HALL: This goes in subject to the objection.

By the COURT: Yes.

Q. Who is Mr. Diefenderfer?

A. He is agent at Belgrade.

As to the condition of the weather the morning we loaded the shipment, it was very rough and cold—it probably was down to  
29 seven or eight degrees below zero and very windy and cold—very rough weather.

Q. Was anything said to you by any agent of the company or by anyone for the company, that the stock was likely to be delayed over and above the usual time for—usual and customary time and ordinary time for shipments of that kind in going from Belgrade to Chicago?

By Mr. HALL: We object to that upon the same ground as heretofore stated—that the contract which has been admitted says on its face that the shipper assumes any risk that might arise from the inclemency of the weather and so forth.

By the COURT: I don't think the question objected to will vary the terms of the contract at all—testimony will undoubtedly have to be introduced with reference to that clause of the contract on defense—I think the testimony is admissible along this line and I will overrule the objection; to which ruling of the Court the defendant duly excepts.

A. No, sir.

Q. At this time we offer exhibits one and two in evidence for the reason that the defendant has set up here that any damage that might—that any damage we might have suffered on account of this shipment of stock was the result of the inclemency of the weather and these are introduced for the purpose of showing just exactly what the weather was and then it is a matter for the jury to state  
30 whether or not the weather was inclement.

By Mr. HALL: You are trying to show that the weather wasn't inclement.

By Mr. AITKEN: No, I am trying to show what the weather really was.

By the COURT: Let the exhibits be admitted.

By Mr. HALL: We have no objection if trying to show what the weather was.

By Mr. AITKEN: I am reading part of exhibit No. 1 to the jury. It says at Bozeman on the second, the day this stock was shipped—it shows the maximum was 13 degrees above zero—that the minimum was 14 degrees below zero—that is the day the stock was accepted for shipment.

By Mr. AITKEN: How much of this do you want read—that is all I want to read.

By Mr. HALL: I think that if you are going to read the document in evidence you ought to read all of it.

By the COURT: Let it be considered read in evidence.

By Mr. HALL: We won't insist on it.

(Exhibits No. 1 and 2 considered read in evidence.)

(Exhibit No. 1 hereto attached.)

I shipped this stock to Wood Brothers, Chicago, as my agents. I got a statement from them showing the weights and prices of the lot there. I couldn't find the statements that they sent me. I searched for it, but I don't know where it is.

31 Q. The record may show that defendant's exhibit No. 3—weights and prices account of Wall is admitted without objection.

By Mr. AITKEN: I will read this exhibit gentlemen.

(Exhibit No. 3 read into the record, and is hereto attached.)

Q. Mr. Wall, in the light of your experience for twenty-seven years in shipping beef cattle from Belgrade and selling them upon the Chicago market what should these cattle have brought you on the Chicago market if they had arrived in the ordinary condition—how much per hundred weight more than they did bring—should they have brought you?

A. They ought to have brought me one dollar per hundred more if they had reached there in good condition.

Wood Brothers were authorized by me to present my claim for damages to the Northern Pacific Railroad. You were authorized to present the claim for me also and to negotiate the same.

Q. Mr. Wall, how often is it necessary to feed cattle, assuming that they have an ordinary run between Belgrade and Chicago?

By Mr. HALL: We object to that question for the reason it is not included—or rather he does not distinguish between a stock run and a freight run—a regular stock train and an ordinary freight train.

32 By the COURT: Are you basing it on his experience as a shipper—basing it on the ordinary runs that have been made?

By Mr. HALL: We object on the further ground that the contract that — is admitted that he signed in this case says that the shipper is to pay for all feed used.

By the COURT: Is there anything in the pleadings here to show the difference between the ordinary stock run and a freight run—is anything said by either of the parties in reference to this matter?

By Mr. HALL: No sir, nothing in the pleadings here.

The COURT: Have you gentlemen pleaded in your answer and is it admitted in your reply that this was a stock run or not a stock run?

By Mr. HALL: We object on the further ground that they must first show what kind of a run his was.

By the COURT: There is nothing here to show what is the difference between a stock run and an ordinary run. I will overrule the objection; to which ruling of the Court the defendant duly excepts.

By the COURT: There is nothing in the pleadings that—nothing in the pleadings to show that there is any distinction in runs.

By Mr. HARTMAN: It is a hypothetical question—you are 33 supposed to base it on evidence that are already in.

By the COURT: I was going to suggest that the question might be asked the witness to show whether he has any knowledge of any run other than the ordinary run.

By Mr. AITKEN: There is nothing in the pleadings to warn us that there was going to be any question raised here as to the difference between an ordinary run and a stock run—we are suing this company upon its common law liability; we delivered so much stock and they undertook to carry it to Chicago.

By the COURT: What was your arrangement for stock train at Billings; I think you had better confine your question—to limit the conditions as the witness understood them in this case.

In the light of my experience, and under the conditions of the run of this stock as I understood them in this case, in an ordinary run sometimes we ship them through in feeding them twice and then in Chicago, making three times. We always hay the cars here before we leave. As to whether I know the difference between an ordinary run and a stock run, I never heard of anything only a stock ru-so far as I am concerned—there may be a difference, but I don't know it, I don't know anything about it. I never shipped any cattle that were carried through on freight trains without other stock that I know of, not that I ever went with or that I know 34 of—we always run into stock trains below here some place—shipped them under the same conditions we did this time—always found cattle along the road.

Q. I will now suspend my direct examination with the understanding that I may recall Mr. Wall if I desire to later.

By the COURT: That is always permissible.

#### Cross-examination.

By Mr. HALL:

I said that I had been shipping stock for about twenty years. I went personally with five shipments, the way I figure it. These trips I have gone down there with them have been in the fall—September or October shipments. I have forgotten whether I ever accompanied any shipment in January or February personally. On all occasions when I have gone to Chicago my stock have been in trains consisting of ten or more cars of stock. We always got in with stock trains—any time I have gone with them. I couldn't say how long before I loaded this stock at Belgrade I had ordered cars, but it couldn't have be-n over two or three days. The weather was pretty fair two or three days before January second, when I ordered the cars. I had to drive my stock four and one-half miles from where they were feeding to Belgrade; that is, where I had them before we shipped. I couldn't tell how much below zero it was

35      the morning I loaded this stock, but it was a very rough morning. The wind was blowing very hard and pretty fierce.

I did not prefer shipping my stock that morning instead of driving them back until the weather changed, I sent my man down—we supposed they had arrangements made, and I sent my man down to see the agent and see what we would do about it and he came back and said that the agent told him to bring in the stock and we would load them in order to catch this other train; in other words, I was trying to catch a stock run. As to whether the fact was that I didn't get the stock to the yards in time to catch the stock run, we got them there as soon as he told us to. I don't know anything about whether before getting the stock to the yards this stock train had passed there. They weren't expected at Belgrade, we expected to meet them at Billings. We were simply figuring on being taken up by the other train at Billings. I suppose that was the reason we were to ship them that bad morning. I thought I would get my cattle into a stock train at Billings. I don't know what stock train I was going to join there. It is my understanding that the agent told me there was a stock train to be made up at Billings. Mr. Diefenderfer, the Northern Pacific agent told me that. He told me that about the time I was there and ordered the cars. My idea was to ship the cattle that morning in order to catch this train out of Billings; because otherwise it wasn't necessary to load this cattle in

such bad weather. I was advised that there had been stock 36      ordered for shipment out of Billings. I don't know anything

about whether this stock was shipped at Billings or not. The steers were three and four years old. I should judge about two-thirds of them were three years old and the other one-third four years old. I had shipped cattle the year before. I shipped the same amount, four cars. In shipping each fall I generally ship all my three year olds that are in good shape, all we find of them. What four-year-olds I had there were cattle I missed the year before, cattle we hadn't found the year before in time to ship them. At least two-thirds of my shipment would be three-year-olds, three, coming four. The cows were all the way from three-year-olds to ten-year olds. The cows had raised calves. I testified that there were 43 steers and fifty-one cows and two bulls. One of the bulls belonged to Mr. Hansen. That makes 97 head, and the three dead cows on the road makes 100. I said I loaded 100 head. The three that died were cows. Instead of having 51 cows I had 54, that is the number I loaded and shipped. I couldn't say how many of these cows were three years old—small per cent of them were three years old—most of them were four-year-old. It is according to how dry and how fat the cows were on the day we shipped them. Whether we loaded them or not. Most of them were four and five-year-old cows. I didn't weight any of this stock before shipping it—

37      before loading it. My estimate on the average weight of these steers is based on my own judgment and from other men's judgments that were around there. As to whether as a matter of fact a man who has had experience with cattle can go out and look at one steer and miss his weight fifty pounds, some

might go out and miss it three or four hundred pounds, but a man that is in practice isn't apt to miss it over fifty pounds. It is not an unusual thing for an experienced stockman to miss the weight of a steer or a horse by fifty pounds. All I know about the weight of this stock is my best judgment and other men's judgment also. After I took this stock off the range I had been feeding them alfalfa, bought alfalfa hay and turned them to it so they could help themselves; that is, they ran to the stacks. As to whether it isn't a fact that alfalfa doesn't make as hard flesh on cattle as timothy hay, in my experience cattle won't gain very much on timothy hay—that is, to get very fat on it. Possibly the fat is softer when the cattle off good grass. From my experience as a stockman I would say that timothy hay after they are taken off the range in the fall—taken off good grass. From my experience as a stockman I would say that the average shrinkage under normal conditions of a shipment of cattle to Chicago in a live stock train would run from 100 to 125 pounds—it depends on the condition of the stock—real fat cattle won't shrink as much as poor cattle. It is generally accepted by

38 stockmen that in the shipment of stock there is a shrinkage of about ten per cent of their weight; that is the accepted theory. I think the largest shrinkage for any twenty-four hours arises during the first twenty-four hours; in other words, they get rid of the big paunch in the first twenty-four hours. I couldn't say what the shrinkage of cattle would be that were put on a train and confined there for twenty-four hours, the first twenty-four hours, because I have never had any experience on that at all. I would not say that it would be half of the normal shrinkage of the paunch of the cattle—it would be some more in my estimation—some more than the average shrinkage. As to whether I have some idea of the weight of good sized steers paunch that have been out in the pasture, I have an idea of what cattle dressed when it is butchered—they run from fifty per cent. to seventy-three per cent. Dressed beef is 73% to 50%. As to what I would say would be the weight of steers' paunch, sometimes it is half and sometimes it is not one-half—that is the paunch in its entire weight—I never weighed the paunch or seen it weighed—never heard of such a thing. When I say nearly one-half of the entire weight I refer to the paunch and head and so on—that is generally thrown away by the most of the butchers; in some cases where poor animals it will shrink half—it will only net half of the original weight—and then it sometimes dresses as high as

39 73% that I have read of. A fat steer weighing 1,400 pounds, when killed and dressed and the part that is thrown away, that part would be twenty-five per cent of the entire weight. In some cases they only dress 50 per cent—and it runs up to where it dresses as high as 73%; but cattle that dress 78 to 70 per cent is considered good cattle. A 1,400 pound steer when killed would dress between 750 and eight hundred pounds, and about half of that is paunch and head, etc., the waste that is thrown away. As to whether it is a fact that when stock are put on the train and carried for 24 hours, that during the first twenty-four hours they eat hardly nothing, yes, they eat. We hayed the cars before we ever loaded the

cattle. As to whether it isn't a fact that they gaunt up and they practically unload their paunch, they are gaunting up all the way during the time you have them on the train of course.

Q. What estimate could you make of their shrinkage during the first twenty-four hours.

By Mr. AITKEN: That is assuming an ordinary run?

By Mr. HALL: Yes sir.

Mr. AITKEN: And under ordinary weather?

Mr. HALL: Yes, sir.

A. They might shrink twenty per cent—we will say they will shrink 100 pounds all the way through.

They would shrink 20 per cent of the 100 pounds all the way through.

40 Q. In other words if the normal shrinkage would figure twenty per cent—would be 100 pounds—you figure that twenty per cent of that would occur the first twenty four hours?

A. Yes if they shrink 100 pounds going clear through they would shrink maybe twenty pounds in the first twenty four hours—but I have no idea what they would shrink—only guessing at it—but I have an idea what they would shrink where they go clear through.

I have never in any shipment I have made weighed my cattle before shipping. I said the average run is about six days from Belgrade to Chicago. I mean by that including the time I stop to feed. In my complaint I allege that I loaded this stock on January second and that they should have been delivered to the party in Chicago on January 9th, not later than January 9th, or about six days. That would be seven days, but six days is the most I was ever on the road at any time I have gone with them. I stated that in all my experience I had gone with stock train consisting of more than ten cars of cattle, or my cattle had been sent with a stock train. As to how long I stopped for feed and rest at the two points I stopped at when I made the run in six days, we most generally stayed about eighteen or twenty hours at St. Paul, that is the longest stay, well sometimes we waited one place and sometimes another. I don't know how long

the law requires us to stop, as to whether it isn't possible that 41 the runs are varied largely by the length of time I desire to stop for feeding and resting at particular points, yes, but I don't know exactly what time—I have gone with cattle when I would have to get up in a hurry and I have gone with them when we would have plenty of time, where I might possibly hold them for twenty-four hours in a place, just such as that—we have got in there—held up eighteen hours in St. Paul. We lay over a certain length of time at certain points so as to reach the Chicago market at certain time in the day, that is we figure on loading a certain day so to get in on a certain day on a certain market. In the ordinary run of six days we would most generally stop to feed about eighteen hours in St. Paul, that is the way it was when I went through. As to how long I generally feed at the first feeding point, at Dickinson or wherever I feed, sometimes you have plenty of time and sometimes you haven't got much time. I have gone through before when

I have fed three times. I fed oftener twice than I have three times. As to where I generally fed the first time, when I went through with cattle we went from here to Mandan, that is the station they call Sunnyside, down by the Missouri River there. The feeding yards are called Sunny or Sunnyside. From there I went to St. Paul, to the feeding yards in St. Paul and from there into Chicago. I don't

know how these cattle were loaded with reference to the cows  
42 that were killed. We figured on loading twenty-five to the car. I don't know in which car the bulls were loaded—I couldn't tell you which car—which car they were in—altogether likely the bulls were not separated. The bulls were mixed up in with the rest of the cattle. The cows were not separated—all mixed up—just loaded into the car as they came. It is not a fact that if cows were loaded in the same cars with bulls or larger steers that the bulls or steers often cause injury to the cow, never did with me. They were horned cattle—some old mules amongst them—mostly horned cattle. The agent did not tell me on the morning I shipped that there might be some delays on account of the weather.

Q. A practical man—a practical stockman—a man that has shipped a great number of cattle—it wasn't necessary to tell you that?

A. I don't know what the weather is going to be—I have some mornings as bad as that and it would turn off as nice as could be in twenty-four hours.

I do not think that the agent had any superior knowledge along that line than I had. I suppose I knew as much about that as he did. If Mr. Diefenderfer told me there would be no delays on account of bad weather I don't suppose he would know any more about it than I did. Mr. Diefenderfer didn't say anything about there being no delays on account of bad weather. There was  
43 nothing said about this matter.

Q. You knew what the weather was and had the stock ready to ship and voluntarily shipped them?

Ans. I brought them there and shipped them according to his orders. I didn't feel that I was compelled to ship them that morning, no more than we sent down word to the agent and asked him if he wanted us to bring them in, because I didn't want to go out there myself; it was so rough, and the man came in and said that the agent said to bring them down. I sent a man down to find out if the company would take them that morning, and if they would I was willing to ship them, I testified on direct examination that in my judgment this stock—the condition in which they arrived at Chicago brought a dollar per hundred weight less than they ought to. I was not down to Chicago at the time the stock were there. I had no means of telling just how the animals appeared at that time any more than the difference according to the way the cattle looked when I shipped them. I don't know how that market compared with the market as it appeared the four or five times I was there. In order that a person could tell anything about what cattle should bring in Chicago he would have to be able to know what the market was on that day as compared with the market on some other time

44 when cattle in the same condition had arrived there, but at the same time I was figuring according to how the cattle was at the time I shipped cattle—I had the market reports all the time and—I had the reports all the time right along up until the time I shipped the cattle. I say from the cattle reports I received that I ought to have gotten one dollar per hundred more than I did receive.

Q. But as to whether the particular market on that date—you don't know whether other cattle brought a dollar more than yours that day—the same kind of cattle and the same weight—do you know that?

A. That is my estimate on the cattle when I left them—I have had quite a lot of experience and knew that if the market stayed as it was when I shipped the cattle—why that was my estimate on the cattle. I had the deposition of Mr. Wood, a member of the livestock commission to whom I shipped these cattle, taken in this case. It was him that made this estimate.

Q. Well now if Mr. Wood testified that in his judgment it appeared—the appearance of this cattle on the date they arrived there caused them to sell for about twenty-five cents per hundred pounds less than otherwise would have, would you say he was mistaken?

A. Of that I can't tell. Mr. Wood is a member of the live stock commission firm of Wood Brothers. They have been engaged in the livestock business for a great many years. I suppose he 45 should be in a better position in Chicago to judge from the appearance of these cattle than me out here in Belgrade. This Mr. Wood was the agent to whom I consigned the stock.

Q. I will ask you to examine the defendant's exhibit No. 1 on cross examination and state if that is your signature?

A. Yes sir, that is my signature.

Q. We now offer the original contract in evidence, Defendant's exhibit No. 1.

A. No objection.

By Mr. HALL: It may be considered as read in evidence.  
(Defendant's exhibit No. 1 attached to back of transcript.)

#### Redirect examination.

By Mr. AITKEN:

These three year old steers which I shipped in January would have been four year olds next spring and summer, the spring and summer of 1912. We shipped them in 1912—they were passed three year old—coming four next summer—and the four years old would be five next summer, that is the spring and summer of 1912.

Q. Now when you state on direct examination that you had shipped fifty one cows, do you mean that they had accounted to you for fifty one cows or what did you mean?

A. Fifty one cows and then these—fifty one cows are the ones that we sold wasn't it—

46 Q. You know—that is what the sales account says I believe—did you not intend to include the dead cows in the estimate you made of the ones that were shipped?

A. Of course, I included them yes sir—they were just as good as any of the rest of the cows only they got killed or died—

By the COURT: Mr. Aitken wants to know if the fifty one included the dead ones or whether it was exclusive of the dead ones.

A. Fifty one was the live ones (witness refers to paper). Fifty one cows is the amount of cows that was sold in Chicago, not speaking of the three dead ones.

The weight of these cattle up at Belgrade was based on my judgment. According to my judgment and according to the way cattle would weigh out in Chicago every other time I would ship. Some on my experience, of course; if I didn't have any experience I don't suppose I could make any estimates. As to whether it is not a fact that even an experienced cattle man is likely to miss the weight of a steer or cow fifty or one hundred pounds, most of them won't—of course you might possibly get closer than that. I have come closer than that myself—of course I am likely to make mistakes. It is quite possible I would miss it that much, and it is quite as likely to

underestimate it as to over estimate it. So a steer at 1,400  
47 pounds is just as likely to be guessed at 1,300 pounds just as well as 1,500. I was cross examined as to the shrinkage of cattle about the paunch. They sell just the same as the other part of the cattle, bring the same amount on the market, because they are sold as live weight.

Q. Calling your attention Mr. Wall to Defendant's exhibit No. 1 on cross examination—the contract introduced—I will ask you what time with reference to the loading of this cattle in cars you signed this contract.

By Mr. HALL: We object to that question as irrelevant and immaterial as to what time the contract was signed.

By the COURT: In regard to this matter Mr. Hall this case it strikes me as following closely that of Nelson vs. Great Northern and Rose vs. Northern Pacific and in both those cases while the contract was plead as part of the defense to the action the same as you plead it; there the court permitted the evidence to be introduced with reference to the loading of the stock in both cases—in loading the stock in the case of Nelson vs. Great Northern and also permitted evidence to be introduced concerning the conditions under which the contract was signed; I don't want to get wrong on this; if you have any authorities or argument to make in this respect I would like to hear them.

By Mr. AITKEN: The theory upon which I am asking this question is this—if the stock as a matter of fact were delivered to  
48 the common carrier, placed in his cars and they took them into their possession before this contract was signed then the subsequent signing of the contract was without consideration.

By the COURT: I will overrule the objection at this time but I reserve the right to strike the testimony from the record later on if I see fit to.

To which ruling of the Court the defendant duly excepts.

(Question read by the stenographer.)

A. The cattle were already loaded in the cars when I signed this contract and they were already pulled out onto the main track.

Q. So far as you know Mr. Wall did you receive any special or reduced rate as a consideration for signing this contract?

By Mr. HALL: We object to that question upon the ground that the contract itself recites that it is at a reduced rate—the consideration of the limits of value placed therein and this question is seeking to vary the terms of that contract by oral testimony.

By the COURT: Sustain the objection; to which ruling of the Court the plaintiff duly excepts.

CHRIS HANSEN, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

49 Direct examination.

By Mr. AITKEN:

My name is Chris Hansen. I live at Maudlow in this county, and I have lived there three years. I am the Chris Hansen whose name is endorsed upon this contract—defendant's exhibit No. 1 in cross examination. I went with this shipment of cattle to Chicago. I came into Belgrade on the morning of January second to find out anything about the cars. That was about seven o'clock in the morning. I went to see the agent of the railroad company. I saw him and had a conversation with him. I asked him when we should bring the cattle in. He told us to bring them in—have them in about ten or eleven o'clock and a fast train would be in to take us out. As to whether he said anything else about any other trains, he said it would take us to Billings and unload there and wait for a stock train to come from Bridger. I communicated this information to Mr. Wall. I was employed by Mr. Wall at that time. We brought the cattle in really, if anything, before that time. The cattle at that time were about four miles or four and a half, probably, five miles out, to the south from Belgrade. We did not immediately proceed to load them when we brought them in. When we got them in they told us that the train was late—didn't know anything about it—and they would have to take us up on a stub. We proceeded to load, and loaded and pulled in on the main track about two 50 o'clock. We started right away. I don't know what time we got to Bozeman, it was getting towards dark before we pulled out of Bozeman. I couldn't tell how long they kept us at Bozeman. We thought every minute they were going to go by the way they were switching us back and forth. They kept us there about an hour or an hour and a half.

Q. What did they do with the stock while they had it in the yards?

A. It was going back and forth the same as we was.

By Mr. HALL: Which yard do you refer to?

A. Bozeman.

Switching around in the yard at Bozeman. As to what was the condition of the cattle as to being on their feet or otherwise when I

reached Bozeman, they seemed to be all right—one of the doors was busted in Bozeman.

Q. Were any of the cattle down?

By Mr. HALL: We object on the ground it is leading and on the further ground there is no allegation in the complaint of any rough handling of this stock.

By the COURT: Sustain the objection; to which ruling of the Court the plaintiff duly excepts.

I don't know what time I got out of Bozeman. It was towards dark, that is all I could say about it—it wasn't quite dark yet when we left. We got to Livingston along in the night some time.  
51 We were held in Livingston about an hour or something like that. We got to Billings at eight o'clock the next morning, Wednesday morning. We unloaded and fed in Billings until the next night; and they told us not to go to bed because they were going to pull us out right away in the evening. The yard master told me that. We reloaded at Billings about three o'clock in the morning, under the instructions of the yardmaster. We got out of Billings at eight o'clock in the morning, five hours after we had loaded. I asked the yardmaster about when I was going to get out, and he said it was blocked—couldn't get in—I asked him what time I could get out and he said any time. I got to Forsyth about two o'clock in the afternoon or something like that. That was Thursday. They held me there three hours. As to whether they gave me any reason for the delay, the train crew wasn't ready. The conductor gave me that reason after they got on the train. We got to Dickinson about two o'clock in the afternoon of Friday, I think.

Q. Two o'clock in the afternoon of the next day?

A. Yes sir—yes sir.

By the COURT: Do you mean the next day after you left Forsyth?

A. Yes, sir.

Q. Now as I understand the ruling of the court we are not permitted to ask any questions as to the condition of the cattle.

52 By the COURT: Certainly you will be permitted to ask questions as to their condition—you couldn't prove any damage unless you were.

Q. What was the condition of the cattle at Dickinson Mr. Hansen?

By Mr. HALL: Wait a minute.

By Mr. HARTMAN: As I understand the ruling of the Court—they can show the condition of the cattle but they cannot show the condition of the cattle from rough handling.

By the COURT: Yes—they can tell—that would depend on what you term the word rough; I want the condition to be confined about—to that which was brought about by the delay of transportation.

Q. Under the Court's ruling I will not ask the witness as to how it happened; I am just asking him for the ultimate fact.

By the COURT: Go ahead.

As to the condition of the cattle at Dickinson, they looked bad and several of them down—one was crippled a little. We laid there all that afternoon and all night until the next day about—I think it was in the afternoon sometime, but I am not certain about that. I couldn't tell you the character of the hay that was furnished me at Dickinson. It was bad but it is hard to tell. It was mostly ice. As to whether the stock seem- to relish it, they wouldn't if they hadn't been so hungry. I think we pulled out of Dickinson along in the afternoon—the stock was loaded anyhow. As a matter of

53 fact I guess it was about eleven o'clock at night that we pulled out. We pulled out right away after we loaded. We were ready to go a day sooner, and the reason they didn't take me was because they said there was no train. I don't know what time I got to Mandan, but it was a slow run. I laid at Mandan about an hour.

Q. What day was that or do you remember—you left Dickinson Saturday—

By Mr. HALL: He left Sunday night—he said he got in there Saturday afternoon and stayed all night until eleven o'clock the next day—

By Mr. AITKEN: He got out Saturday at eleven o'clock he said.

A. It was some time Sunday.

The condition of the cattle was not bad at Mandan. We had a pretty fair run—there were a few down generally. The cow that was crippled at Dickinson got down after we left Mandan, and at the first division point we came to we tried to get it up and couldn't—we went in and told the yardmaster about it and he didn't seem to care much about it—then we ordered them to unload, and they didn't seem to give any answer. As to the reason he gave for not unloading, he said he didn't have any engine at first and then later he said he didn't have time.

Q. Did you insist that they unload—did you tell them you wanted them to unload?

A. No, sir—

54 By Mr. HALL: What point was this?

A. At Jamestown.

They went on without unloading the crippled cow. They pulled out of Jamestown about midnight.

By Mr. HALL: What time did you get to Fargo?

A. Eight o'clock in the morning.

We did not, as a matter of fact, pull out of Jamestown about seven o'clock Sunday evening. As to the time I got to Jamestown, we were there about an hour or hour and one half or two—we were working and I didn't pay much attention to the time—we were working with the cows and didn't pay much attention to the time—the time went fast there. I got to Fargo about eight o'clock in the morning. As to the condition of the cattle, they were looking worse right along. There was one of them dead. I left the dead cow in the car. I guess it was unloaded—I saw the skin before we left. I don't know who skinned it. We fed at Fargo. The service in unloading was poor. They delayed us about half an hour trying to fool around with the

stock. One of the reasons for the delay was that they didn't have long enough side track, they could only push two cars down in at a time. They handled it by pushing two cars down at a time. They left the other two up on the other side track until they unloaded  
the first two. You understood me to say that they pushed  
55 two down and unloaded them and then came back and got  
two more and took them down and unloaded them. I didn't get any help there to unload. The quality of hay furnished there was fine, but the water was more mud than anything else. I suppose the cattle had to drink it the way it was, but they didn't drink much. We leaded up at Fargo to leave about eleven o'clock that night. They did not pull me out as quickly as I was loaded. They detained me about a half hour or one hour. Then they took us across to the division point or some junction and left us on the sidetrack there. That was at Dilworth. They kept me on the sidetrack there about four hours. I don't know what time it was when I pulled out of Dilworth. It was pretty late, or rather early. I got into Staples about the next evening. As to whether I was sidetracked at all except at Dilworth between Fargo and Staples, probably a little while, not much. They did not hold us at Staples very long. They got stuck at Darling. They couldn't do anything and they left us on the sidetrack. They left us on the side track about six hours. We were there long enough to discover our cattle were on the sidetrack.

Q. Was there anything happened to the train—did they pull you on into Staples.

A. No, we were passed there?

By Mr. HALL: I think you said this was Darling?

56 By Mr. AITKEN: It was between Darling and Staples; did you get into Staples before the cattle?

A. We were passed Staples.

We got into Little Falls about six o'clock in the morning. I don't remember what day it was. It was the next day. As to what happened there, there was a cow dead—they cut us away from the stock at Darling. I mean by that they cut the train in two and left the cattle somewhere—I couldn't tell where they was because it was dark—and fetched us into Little Falls and told us that the cattle would be there later on—they told us that the cattle were with us when we were going in but when we got to Little Falls they told us that the cattle were cut off from the train and were back a ways and would be in soon; when they go in one of them was dead and a lot of them were down. You understood me to say that they cut the train in two leaving the cattle on the sidetrack and hauled me to Little Falls and left the cattle behind. The cattle arrived in Little Falls about a half hour or an hour after we arrived there. I did not know that they had taken me away from the cattle until I got to Little Falls. As to what I did when I got to Little Falls with reference to getting the cattle over the road, we went into the yardmaster's office and asked him if we could get out and he said I guess there would be an engine take us right

away—when the cattle came in—and when they came in I  
57      went in and reported that one was dead and he claimed he telephoned to the head office somewhere and they told him to bring the cattle on through if he couldn't bring anything else. The yardmaster told me that. I remained at Little Falls about an hour or an hour and one half or two. They did not take me on in alone then in accordance with what the yardmaster said. I couldn't say what they did—it seems like they were going slower than ever. They didn't take the cattle in alone. I got into St. Paul about two o'clock in the afternoon. I unloaded as quick as the stock yard engine came after us—we were left on the sidetrack quite a while. That was the first time the cattle had been unloaded since leaving Fargo. It was thirty-eight hours from the time I left Fargo until I got to St. Paul. I left St. Paul the next evening about nine or ten o'clock. The cattle seemed to be in pretty fair condition—filled up pretty good. I don't know what time I got into La Crosse. They kept me there about an hour. I think I got into Savannah about midnight. It didn't seem as if there were any good runs any place. There was more cattle down along anywhere. There were some down at Savannah. I went into the yardmaster's office and told him what was the matter and told him if I could get hold of some lumber I could get her up, and he furnished me the lumber. They treated me at Savannah very nice. I pulled out of Savannah—

58      they were waiting for us on account of our pinning that cow up. I got into Montgomery about eleven o'clock the next afternoon. I unloaded there and fed there. The cattle had been fed last at St. Paul. I am not sure how long it was since they had been unloaded before, but better than thirty eight hours. As to what happened to the cattle at Savannah or any of them, there was just the one down and we pinned her up, as I said. That cow dies the next day at Montgomery. As to the condition of the cattle when they got to Montgomery, they were pretty gaunt and bruised up quite a bit. It is thirty-seven miles from Montgomery to Chicago—we went back two miles to Aurora in the country. I had a conversation with the conductor between Livingston and Big Timber. I said if he would unload the cattle for us we would drive them across and beat him to Billings. I told another conductor the same thing at Darling; that was between Darling and Little Falls.

Q. What was the special occasion of your conversation with the conductor near Little Falls?

A. I told him the same thing.

By Mr. HALL: If this conversation is just what the witness said and not what the conductor said it is immaterial.

Q. What did the conductor say to you—

A. I told him something—the same thing—we had only gone twenty-five miles in twelve hours.

By Mr. HALL: We object to that as immaterial—he shouldn't state his opinion.

59 Q. What did the conductor say when you were near Little Falls about the run if you know?

A. He didn't say much—felt pretty sore about it—we had only made twenty-five miles in twelve hours.

By Mr. HALL: We move to strike out as to what the conductor felt.

By the COURT: Strike that out.

Q. We agree to that—what did the conductor say Mr. Hansen, if anything.

By the COURT: Tell what was said and—between you and the conductor.

A. Not very much. We kept asking him if he was going to stay there long and he said that is something I couldn't tell and I said, if you will unload the cattle for us we will drive them across.

By Mr. HALL: If there were any statements made by the conductor of the train that are competent and binding I think they are proper but I object to this question as to the time they were making; it shows so far that they were making good time.

A. He said that it was the slowest trip he ever made.

He told me the distance they had traveled. He said they had traveled twenty five miles in twelve hours.

By Mr. HALL: This was at Little Falls

A. Yes sir.

60 We loaded out of Montgomery about five o'clock in the afternoon of Sunday. They took us to Aurora. We got there about an hour after, and they kept me there until eleven o'clock. They put me on a sidetrack. The reason they gave for keeping me that long was that they didn't have any train to Chicago. I had trouble finally getting out. I heard the yardmaster talking—I think he said they were going to take the front part of the stock train and bring it into Chicago and then I spoke up and asked them if that meant the cattle and he said no, it was the sheep; I said you better get them cattle out; they have been on the sidetrack long enough. So they finally agreed to take the hind part too, and they took me out. I have handled cattle all of my life. I have handled them everywhere—the old country and this country and everywheres I have been. I have been in this country eight years, and I am twenty-five years old. I have been handling range cattle—range beef and cattle, about three or four years. I have made other trips to Chicago with cattle than this one; in the fall of the year, as late as December. The weather was cold. I got a fair run in that case. I was on the road six days one trip and five the other. As to the condition of those cattle when I shipped them at Belgrade as to being good beef cattle, they were as fine a bunch of beef cattle as I ever seen. As to their condition when I arrived at Chicago, most of them was cripples and bad looking and everything else.

## 61      Cross-examination:

By Mr. HALL: I testified that I came into Belgrade about seven o'clock on the morning of January the second. At that time I came in for the purpose of ascertaining whether the company would take my cattle that morning. The agent simply told me that I could bring them in if I wanted them shipped and that he could pick them up in some of their trains. He said that I should get them there about ten or eleven o'clock in order to catch the fast freight. He said the fast freight was late but he thought it was about that time. It is not a fact that it was about one o'clock when I got my cattle in there. It was about two o'clock when we got loaded. I started loading immediately after I got there, and as quick as we loaded we pulled out. It was about three or four hours after my cattle got to the stockyards at Belgrade before I got them loaded in the cars. Myself and Mr. Wall and my brother and a couple of other men loaded the stock. The other men were not railroad men. The five of us loaded the stock.

Q. Now isn't it a fact that the stock arrived at the yards about 1:00 p. m. of January second?

A. My watch must have been—

Q. (Interrupting.) One o'clock in the afternoon when you got your stock to the yards there?

A. No sir.

I think it was about ten or eleven o'clock when I got to the yards there. As to whether it took me from eleven o'clock to three 62 o'clock to load four cars of cattle, there was no engine there when we came. The engine came along about one o'clock. As to whether that was the engine on the train that took me on, that is something I couldn't tell. As to whether it isn't a fact that I didn't get the cattle in there in time to get them loaded and attached to the fast freight that went through there, the fast freight was late—didn't go through at all. I don't think the fast freight went through at all so I got them on a local freight. There was nothing said about whether I preferred taking the local freight when that came in instead of waiting for the fast freight. I took the first train they shoved us on. I lost two or three hours' time when I got to Bozeman here. All I know is I was in the caboose and they switched around some time before starting off. It was two o'clock when I left Belgrade. It is not a fact that I left Belgrade at 3:15 that afternoon. I left at two o'clock. I don't remember what time it was when I got to Bozeman. I came right along slowly from Belgrade to Bozeman. It was not very cold weather at that time. It was above zero. There was very little snow. The wind was not blowing when we were coming across. I don't know what caused the delay in Bozeman, not unless they had fun shoving us around seeing how we liked it. I don't know for what purpose they were

63      moving those cars around. As far as I know there was not a number of cars in that train that were billed for Bozeman that they had to take out and leave here. As to whether I don't know but what all the time consumed at Bozeman was regular work that train had to do, I didn't see what work they were having.

Q. In other words you thought just because there were four cars of cattle in that train they should take that train right on there is that the idea?

By Mr. AITKEN: There is no use of Mr. Hall arguing here with the witness—ask him the reason and that is enough.

By the COURT: This is cross examination.

Q. You thought because there were four cars of cattle in that train they should not do their ordinary work at Bozeman?

A. I always heard that where cattle are handled they should be put on the side track and not be jammed around.

As to whether it wasn't the time I was complaining of but switching them around is what I was complaining about. No, they were jamming them around and the car door broke in one of them and one of the cattle had its foot hurt in there. Part of this time I was in the caboose and part of the time I was out to see what the cattle were doing. I don't see how the amount of time they consumed in Bozeman was a reasonable time for the amount of work they were

doing. I could do that much myself without an engine. You  
64 understood me to state that I didn't know just what they were doing while they were in Bozeman. I don't know but what the work that took up that time was necessary work for that train to do. I left Bozeman about dark. That would be along about five o'clock in January. We got to Livingston in the night. I had not gone to bed because I didn't have any place to go to bed, I slept in the caboose all the time. I was not sleeping most of the time after leaving here. It was in the night sometime when I got into Linvingston. I don't know whether it was before or after midnight. I remained in Livingston about an hour. I don't know what was the cause of their staying there that long. As far as I know they were doing the necessary work of the train before they went on. I don't know what time it was when they left Livingston. They got to Billings at Eight o'clock in the morning. I didn't sleep most of the time from Livingston down to Billings. I tried to keep awake anyhow. I was out of the caboose several times from the time I left Livingston until I got to Billings. When I got to Billings I was unloaded right away. I stayed in Billings until the next morning. We loaded up at five o'clock. I did not connect there with any stock trains, regular stock trains. The livestock train I was supposed to connect with didn't start out at all. They didn't say whether it was on account of the weather, these people didn't ship

their stuff. We got ready about five but didn't leave before  
65 eight. We waited five hours for this other freight to come along. I said we loaded at three o'clock in the morning. That was the time this freight I was to leave there on was supposed to get there, and it didn't arrive until eight o'clock in the morning. As to whether I know what delayed that freight west of Billings, the Burlington pulled in ahead of it.

By Mr. AITKEN: He asked you if you knew.

I don't know what delayed that freight so that it didn't get there at three o'clock in the morning. If there was something that

delayed that freight over which the railroad company had no control, I don't see why they had us load them then. Three o'clock is the time that the trains was supposed to be there. It was delayed just outside of the yard west of Billings. As to whether it was delayed by a Burlington train, it was all hearsay with me but that is what they told me. Of my own knowledge I don't know what caused the delay after I was loaded there at Billings. It was two o'clock the next day when I got to Dickinson, two o'clock in the afternoon. I unloaded there at Dickinson. The reason why they unloaded at Dickinson was because it was so late they had to in order to get the stock off in time. The reason I didn't go on to the next feeding place was because then it would be about fifty hours. I unloaded at Dickinson to keep within the thirty-six hour law. The

way we were running it might have been sixty hours before  
66 we got to the next stopping point. I testified that I was held

three hours at Forsyth. The train crew told me that the reason for that delay was because their time wasn't up. That is, that the next crew that was to take my train from there on hadn't had their eight hours' rest after working sixteen hours. So they had to wait three hours in order to comply with the law before they could send you on with that crew. There were lots of cows down upon my arrival at Dickinson. There was one crippled. I stayed at Dickinson from two o'clock one afternoon until the next day sometime. It was pretty late the next day when I loaded up, quite a bit after dark. I don't know whether any of the bulls were in the car where the cow was crippled. There was one in each of the other three cars. This cow that was down was a pretty good cow. As to whether it was an old cow or a young cow, it was about medium. The weather along there between Glendive and Dickinson was a little cold, but not much. It was below zero. As to whether it is a fact that when the weather is below zero the stock making water in the cars makes them icy and bad, I tried to get them sanded every time we unloaded. Where it is below zero the water, in extremely cold weather, makes the cars a good deal more icy than otherwise from the water coming from the animals. The cattle do not fall much easier, not when they are loaded good. As to whether I think

cattle can stand up on an icy flood as well as they can on  
67 other floor, when there are so many in a car they hold each

other up, but if one slips and gets down I haven't seen the time when we couldn't help it up. They can get up of their own accord if one gets down in a crowded car. They have all got to eat, the whole bunch of them, and they will get up sometimes. I testified that I wanted to get out of Dickinson earlier than I did. The reason I didn't get out was because there was no train. I expect they put me on the first train that came along from the west. I expect the train that finally picked me up was delayed, I don't know but what I said it was. The cattle were not loaded in the cars at Dickinson very long before the train came and picked me up. The cars were ordinary open stock cars, and bum ones at that. I made no effort to try to sell this cow that was down and crippled at Dickinson. They had it skinned before I knew it. This was not done

at Dickinson. She wasn't dead at Dickinson. I didn't try to sell her there or dispose of her, because I didn't have any right to sell anything. I put her back in the car in her crippled condition. She seemed to get better there. She was still on her feet when I got to Mandan. That is one hundred and six or ten miles from Dickinson. I don't think the condition of the cattle were as bad at Mandan. It was about half way between Mandan and Jamestown that this cow got down again. That is one hundred and six miles farther, or something like that. I tried to get her up, but couldn't.

68 I wanted to unload the stock at Jamestown, and they said they didn't have time to unload there. I don't know why they didn't have time to unload there. They were trying to reach some place to feed—trying to reach Fargo in time to feed. In order to unload this cow that was down I would not have had to unload all my stock, just one car. The balance of the stock had been—the balance of the stock down in the car—if I had unloaded that car I would have had time to reach Fargo without violating the thirty-six hour law. As to whether it was my idea to go on with the three cars and leave this one at Jamestown, it doesn't take long to unload and load a car, it don't take over forty-five minutes to unload and load a car after they have been in there once. As to whether I could handle them better there than I did down at Belgrade, it is always harder to the first loading. It took me from ten to two o'clock at Belgrade, but the engine wasn't there to help us right away. It was there to help me at Belgrade about one o'clock. I wanted them to stock and detach the engine and come back and spot this car out at Jamestown and unload it for the purpose of getting out this one cow. They didn't tell me that they thought it was better to go on to Fargo where I could unload all of them. It was better to unload that car then than to go on to Fargo. As to whether I know how it was that I made my demand upon — to unload this stock at 69 Jamestown, they told me it was the yard master. I don't remember his name. I couldn't tell you whether his name was J. E. Johnson, because I never heard it. I signed a statement regarding this cow when I got to Fargo. I made a claim there that they refused to unload the stock at Jamestown.

Q. Did you make any statement like that in your own written statement.

By Mr. AITKEN: I object to that—if there is a written statement the witness should be shown the statement.

By the COURT: The witness is entitled to see the statement if he has got to testify about its contents.

Defendant's Exhibit No. 2 is the statement I signed at that time. Charles Hansen also signed that statement.

By Mr. AITKEN: There is no objection to its admittance if you want to offer it in evidence.

I will ask you to refer to that and state whether when you got to Fargo, as to whether you made complaint at their not allowing you to unload in Jamestown?

A. That is something (referring to statement) I went into the freight agent and he wrote this out and asked me to sign it and I did.

By Mr. HALL: We offer in evidence defendant's Exhibit No. 2.

By Mr. AITKEN: No objection.

By the COURT: It is admitted in evidence.

70 (Defendant's Exhibit No. 2 read to the jury. Copy attached at end of transcript.)

It was about eight o'clock in the morning that I got to Fargo. I stayed there until about eleven o'clock that night or twelve—eleven, I guess. The condition of the weather was pretty fair from Jamestown to Fargo. It was below zero. I call weather below zero pretty fair, and call it bad weather when it is snowing and blowing, when you can't get through. I said I was delayed at Fargo in unloading. I don't know who was to blame for the delay. We hung around and tried to get them to unload and when we got around to it the switch was too short when we got down there. In front of the stock yards the switch was too short. I guess there is no regular feeding station there at Fargo. They have some pens there though that they use. We were ordered to unload and feed there. The reason I did that was because if I stayed on longer I would exceed the thirty-six hour limit. The run was slow that day too. I expect they would have exceeded the thirty-six hour limit if they had gone any further. During none of the time was there any cars of cattle in the train excepting my four. There was no livestock of any other kind in the train. It was about half an hour after they reached Fargo that they came up and got hold of the first two cars to take them down to the stock yard. As to whether I know

whether they were handling some cars of fresh fruit, they  
71 said they had no fruit in there at all—they were up in the round house—they weren't handling fruit. The train crew said that. There was no fruit. They had on Japanese fans and they couldn't freeze very handy.

Q. Don't you know as a matter of fact there were some perishable goods—there was fruit or perishable goods in that train that was apt to freeze and they were handling that stuff instead of coming after your stock?

A. If they had apples and they had froze they wouldn't suffer as much as cattle.

They said they didn't have any stuff of that kind.

By Mr. AITKEN: If it is the theory of the counsel for the defendant here that because they had other work to attend to that they could neglect this stock, I think their theory is wrong, and the questions are irrelevant, incompetent and immaterial.

By the COURT: You shouldn't object to that.

The hay was all right there at Fargo. I couldn't tell where they got their water that was furnished at Fargo. It came out of a hose there in the stock yards. It was muddy, couldn't get it to run out of the hose freely. That was on account of the cold weather and it was too muddy to. I don't know whether it was the water that

was used throughout the city. I said I was left on the side track two hours at Dilworth and if anything longer than that. I don't know the cause of my being there that length of time not unless the railroad company didn't care. I am not able to testify as to why they held me there two hours. I don't know whether it was to meet delayed trains or passenger trains or break downs or what caused it. I said I got stuck at Darling for about six hours. I don't know what caused the delay there. The conductor said the engineer didn't know. The condition of the weather there was the usual weather below zero. I was out of the caboose there at Darling during that six hours lots of time. I didn't see the train crew doing any work around there. As to whether they were just simply standing there for six hours, I didn't look at the train, I was just attending to the cattle. The cattle were the first four cars ahead of the caboose. I don't know whether the train crew were in the caboose or at work on something on the train. I have no idea what caused the delay.

Q. Except that you think that the railroad company wanted to hold you there?

A. That is all I could see. They finally cut me and the other Mr. Hansen, who is my brother, out and ran us into Little Falls ahead of the stock. It was six o'clock in the morning when we reached Darling. I didn't know I had gone in ahead of the stock until I got there. I was not asleep during that time. I didn't sleep but very little from the time I left until I got to Chicago, very little you can sleep when you got cattle to look after; a fellow

would soon find that out if he went with cattle a couple of times. It was about an hour after I got to Little Falls that the cattle came. As to whether it isn't a fact that on account of the cold weather and inability to move this stock they had to divide the train in order to get me in there, the conductor said it was all carelessness that we could have made it easy. I didn't ask the conductor's name, that is something I didn't care about. That is not the conductor in charge of this run from Staples to St. Paul. The first time was up before he got to Little Falls. He was the conductor that took charge of the train at Staples. He told me that this delay in dividing up the train was all carelessness. He said it was carelessness on the part of the engineers. I mean that the loss of six hours there and the dividing of the train was carelessness on account of both. As to whether in other words it was carelessness to take us people in ahead of the stock, I guess they had to because they got stuck; they said the brakes was holding and they couldn't get them off again he said. That is not a condition that arises on account of the extreme cold weather, but on account of carelessness. As to whether it isn't a fact that in very cold weather the air pipes burst and cause the brakes to set, he didn't have any reason—the conductor just stated that. I was in Little Falls about an hour, or something like that, before the cattle got there. I guess the cattle got along without my company just as well as they did with it. Of course if I had been with the train from Darling to Little Falls I would have ridden in the caboose, but the cattle wouldn't have been standing on the sidetrack that

length of time if they had gone with us—and then we could have punched them up while standing there if we had been there. We did not unload again at Little Falls. As far as I know the two parts of the train were put together again at Little Falls and went on into St. Paul from there. So that if the cattle had gone with me on the first division the only difference would have been that instead of standing in the cars at Darling until they took the second part of the train up, they would have been standing in the cars at Little Falls until it got there, and during that time I could have been punching them up. I testified that I have accompanied other shipments of cattle, and in every shipment I have made I have had to punch the cattle to get them up. I have to do that more or less. It does not follow that in an ordinary run with stock it is necessary that sometimes the cattle will get down not when you handle them carefully. It is the rough handling that makes them fall down. It is not a fact that in runs where you have normal conditions that you have to get out pretty nearly every time you stop and find cattle down, not all the time. At odd times they will lay down but they won't if they get a decent run. I know what time it was when I left Fargo. It was eleven or twelve o'clock. About eleven or twelve o'clock at night. I am not sure whether it was eleven or twelve. It was loaded at eleven o'clock, but they  
75 never crossed the bridge before twelve though. They arrived in St. Paul about 2 o'clock in the afternoon the day after.

By Mr. AITKEN: I don't think the witness understood the question, Mr. Hall.

A. Just thirty-eight hours.

Two o'clock in the afternoon the next day is the time they were unloaded. I was not there unloading at that time; set in at the chutes at two o'clock, in St. Paul. I said it was two in the afternoon when we got into St. Paul. We were on the car thirty-eight hours from the time we were loaded. We left Fargo at eleven o'clock at night. The railroad company marked it at twelve—it was eleven when it was loaded at Fargo. I guess I changed my watch going east. I know that I changed it. We unloaded at St. Paul at two o'clock in the afternoon and stayed there all the next day until the next night about nine o'clock when we loaded and the cattle looked pretty fair when they left St. Paul. We unloaded about nine o'clock the next evening. I don't know what time they got to La Crosse. It was a night and a day run down to La Crosse the way they went. I don't know what time they did get to La Crosse. The stock got to Montgomery about eleven o'clock in the morning, a couple of days afterwards. Montgomery is a feeding station about three miles from

Aurora, two miles. It was about two hours and a half after  
76 the stock got to Montgomery and was unloaded there that I and my brother went to Chicago. I did not instruct them there at Montgomery to feed and water the stock and load it out Sunday night so it would get into Chicago for the Monday morning market, I came back and loaded out Sunday afternoon—I came back

and got them and went along with them. It isn't a fact that I went into Chicago and these cattle were loaded out by the train crew and I didn't come back, I came back. As to whether I didn't give my instructions to load the stock and notify Wood Brothers when they were loaded, I left orders to feed and water them and see they had plenty to eat. I didn't go into Chicago and leave word for the train crew at Montgomery to call up Wood Brothers and notify them at what time they were going to start. I said I didn't know what time the cattle left La Crosse. It was in the night time when they left Savannah, about midnight I should judge or something like that towards morning, of the night before they got to Montgomery; that is, they left Savannah at about midnight and got to Montgomery the next day at about an hour before noon. We had picked up other livestock in the meantime; lots of them in Aurora. That is the station that is a few miles from Montgomery. From Aurora to Chicago is my last run. Up to that time I didn't have any stock in my train only these four cars, they just cut them in two in order to get

a slow run. After unloading the stock at Montgomery we  
77       went into Chicago on an Electric Railway. We didn't go in on the Burlington at all. It was about three—two or three o'clock in the afternoon when we went in, the afternoon of Saturday. I came out on the electric cars. I went to Montgomery and got there about four or half past four in the afternoon, and it was about an hour or half an hour after that that the stock were loaded. They were taken by a switch engine to Aurora. It was cut in two—just picked up odd cars whenever they had time. I mean by cut in two that they just took the cattle and didn't care for any more—they were going to take the sheep and leave the cattle but when I got after them they took the cattle. That was a through train that came along there and was going to pick up the sheep and leave the cattle until I got after them and they took my cattle and went into Chicago. My cattle were in Aurora about five or six hours after they were switched down from Montgomery. I don't think they went out on the first freight train that came along. I don't know whether they did or not, there were lots of trains went through there. As to whether on these other trips I have made to Chicago they were on regular stock trains or on freight trains, they were all kinds—I never seen a decent stock train yet because they always load them up with dead freight. If more than ten cars of stock are in a train that makes it a stock train. I went to Chicago three years ago when there were less than ten cars of stock. This was on the Milwaukee, they picked up more at Marmouth. I didn't go

78       from Belgrade or any point in Gallatin County with a train of stock having less than ten cars before this time. In these runs we always stopped for feed and rest at Marmouth and Montevideo for ten or fifteen hours. I never made any trips over the Northern Pacific, and I hope I never do again. I shipped stock over the Milwaukee from Belgrade; took them over to the Milwaukee on Sixteen Mile, and reached the Milwaukee at Belgrade.

Q. You testified you had been shipping stock for four or five years?

A. The other time was from Dorsey.

In shipping on the Milwaukee we made two stops one at Mar mouth and one at Montevideo, and then into Chicago. Montevideo is farther from Chicago than St. Paul. I don't know whether the thirty-six hour release was signed before this stock was shipped; that is something I didn't do myself.

Redirect examination by Mr. AITKEN:

Q. As a matter of fact Mr. Hansen the manure in the cars took— takes the place of sand very chiefly—

A. (Interrupting.) They were awfully saving of it—looks like it costs an awful lot—had a hard time to get it too.

Q. The question I asked you was this—what is the effect of the cold weather on the manure in the cars?

79      A. Hay is best—

Q. What is the effect of the cold weather on the manure in the cars?

A. I don't understand that—

Cold weather freezes the manure in the cars, and that makes the cattle stand up better, makes it rough so they have a better chance to stand up. The freight agent at Fargo wrote out defendant's exhibit No. 2 on cross examination and asked me to sign it. I did not write it. There was no other livestock put in this train before I reached Aurora. I was from eleven o'clock in the evening to three o'clock in the morning from Aurora to Chicago. It is thirty-seven miles.

Recross-examination by Mr. HALL:

I was at the stock yards at the chute at three o'clock in the morning, ready to unload. As to whether I couldn't sell any stock before the market opened—it was Monday—that is something I didn't have anything to do with. If I gotten the stock there at two o'clock instead of three o'clock I couldn't have sold them before nine or ten o'clock the next day.

By Mr. AITKEN: Wouldn't the stock have been better off in the pens than in the cars during that time?

A. Yes, sir, a whole lot.

80      CHARLES M. McDONALD, a witness produced upon behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. AITKEN:

My name is Charles McDonald and I reside in Belgrade—not exactly in Belgrade, just out of Belgrade about two miles and one-half. My occupation is that of farming and livestock raising. I have been engaged in the livestock business about twenty-one years. During that period I have had occasion to ship beef cattle from Belgrade to Chicago. I have made three trips. I shipped in the year 1909 and 1911. 1909 is the first year I shipped anything, I always sold here before that. In 1909 I loaded in Belgrade on the 30th day of

November. The next year I loaded I think, on the sixth of December, and the next year I loaded on the sixth of November. I shipped in 1909 on the Northern Pacific and 1910 on the Milwaukee and 1911 on the Northern Pacific, routed over the Burlington. I encountered bad weather during these periods. In 1909 we ran into a pretty heavy blizzard in North Dakota. On the Northern Pacific. It lasted about twenty-four hours. It snowed and then blew, it was quite cold. It registered twenty when we left—when we arrived at St. Paul—below zero. We loaded on the 30th, left Belgrade late in the evening and we arrived in Chicago on the 4th of December. Left the thirtieth of November about nine thirty and arrived in Chicago on the fourth of December, five days. The train was delayed a little

on account of the storm. As to whether the cold weather  
81 seemed to cause me much trouble, well I don't know what

their schedule was but they claimed they couldn't make as good a run as if the weather had been milder and better. Yet under the circumstances as they were I made the run in three days. I stopped to feed twice on that occasion—at Sunnyside and St. Paul. It is customary to stop between Belgrade and Chicago to feed generally about twice. I have shipped all kinds of cattle. I have shipped bulls along with steers and cows. I have never experienced any injurious effects from that. I never could see that it made any special difference. As to the character of the weather when I made the other two shipments, when I went along, in 1910 the weather was nice all the way but the next year it was very bad again—we couldn't get to the first feeding pen at Sunnyside in time and we had to—they put us out at Dickinson on account of the bad weather. The weather was very cold—it was fourteen below when we arrived at Dickinson at eleven thirty that evening. That state of the weather continued until about eleven o'clock the next day. I was five days making that run that time from Belgrade to Chicago. I feed twice, at Dickinson and Staples, and run from Staples on into Chicago. I have had more or less beef in all of these years I have been handling cattle—but only shipped to the Chicago market these three years—always sold here up until this three years.

82 Cross-examination by Mr. HALL:

These three times are the only trips I have had to Chicago. On the first trip I encountered a blizzard in Dakota that lasted about twenty hours. There was a storm on here when we loaded and when we got over the mountain it kept getting worse and when we got into Dakota it was a pretty bad storm. It was below zero weather here when we were loading. We had twenty-one loads of stock in that train. We had some dead freight besides the stock. I couldn't tell you exactly the number of cars we had. When we got to St. Paul they put fourteen more loads on us out of St. Paul. I couldn't tell you exactly the number of dead freight cars I had between here and St. Paul. I know we had some. I think about nine loads, but I wouldn't testify to that being correct. I think that would make about thirty cars in my train from here to St. Paul. We got out of

the storm before we got into St. Paul—it was bright and clear when we got into St. Paul—it was twenty-two below, the thermometer registered there—I saw it myself at the yards there. The weather got milder and it was good weather from there on into Chicago. We left Belgrade somewhere around five o'clock on that first shipment on November 30th, 1909, five o'clock in the evening and arrived December fourth in Chicago—at nine thirty in the evening. So as a matter of fact the first market I could reach there was the morning of the fifth.

83 It was the market of the sixth day that I reached from the time I left until I got to Chicago, from the time we loaded until we were on the market it was the sixth day. If the stock had arrived there at three the next morning after I arrived there, they could have been on the same market I arrived in time for if they had of wished to. In the different shipments I have made I always had more than ten cars of stock. I never noticed anything in these shipments whether the bulls had any tendency to injure the other cows or stock in the train, they did not, not in my case. I have shipped bulls in 1909. I had seventeen bulls in my bunch, in with the cows. They were just mixed in amongst the various cars. It is not a fact that a bull looses his usual courtesy when he has been on the train a day or two and gets vicious. My stock were some muley and some horned. Most of them were horned. My second run was made in five days. I left on that run about four o'clock in the evening. That is the second trip, but the first time I shipped on the Milwaukee railroad. Shipped from Belgrade. That was December sixth. I think it was on the eleventh about ten twenty that I got into Chicago—ten twenty in the evening. It is my recollection that I reached the market on the sixth day from the time I left. I think we had fourteen loads of stock out of Belgrade on that train and I think we tied on four at Josephine. I did not have

84 much dead freight in that train until we got over the mountain—then they commenced to put on dead freight—out of Marmouth they put on eleven loads. I didn't have much dead freight until I got to Marmouth, had a few loads but not many. That was not the run where I fed at Dickinson; it was the next run that I fed there. The next year I again shipped over the Northern Pacific. I shipped from Belgrade. I had nine loads on in that shipment. I had a little bit of dead freight. I was the only one to be loaded out of Belgrade that year. I picked up the next cattle on that run in Livingston, picked up four loads there. If you call thirteen loads a stock train of course we had a stock train. I had dead freight loads from Livingston on in that train. They kept putting on quite a few more loads and when we got down into Dakota we picked up a couple of loads of cattle and then we picked up three more in Minnesota, I think. I stopped at Dickinson on that trip. I stopped there at that time because I couldn't get into Sunnyside within the thirty-six hours and so we had to stop at Dickinson. It was caused by cold weather, that is what he said, it was a pretty bad storm. There was no wreck or anything of that kind but just inability to make the time on account of cold weather.

Cold weather affects cattle to some extent in shipping. It depends on how cold it is.

Q. What would you say as to the effect upon cattle if it was below zero when they were loaded at Belgrade and practically remained below zero—and several points on the road reaching thirty and thirty-five below zero—all the way to Chicago.

85 A. It would have some effect—I couldn't tell you just what effect it would have; because from my experience severe cold weather—twenty-five, and thirty and thirty-five degrees below zero would effect cattle some but I don't anticipate to any great extent.

Redirect examination by Mr. AITKEN:

The longer the cattle are out in the cold weather the more it would effect them. It is my judgment that cattle thirteen days out in cold weather would be much more seriously affected than cattle that were out only five days, that is the reason we purposed to run on into Sunny and not be allowed to unload at Dickinson, but we couldn't break the state law and so we had to unload at Dickinson. In each of these shipments I made I carried dead freight most of the time in addition to my stock. So that in either case they had not given me a pure stock train all the way through.

Recross-examination by Mr. HALL:

I testified that in my run at the time that I unloaded at Dickinson I then went to Staples and from Staples into Chicago. I think we pulled out from Staples between eleven and twelve o'clock, and we arrived in Chicago—that was on Sunday night—and we arrived in Chicago Tuesday morning at about eleven—between eleven and twelve o'clock somewhere.

86 By Mr. HARTMAN: Left eleven o'clock Sunday night and arrived in Chicago eleven o'clock Tuesday morning?

A. Yes, sir, we just got inside of the 36-hour limit.

I had good weather from Staples on in to Chicago. As to whether if I had zero weather it would have been possible to have run in in that time, not exactly zero weather, but if it had been thirty or forty below we might have had trouble—I don't anticipate that zero weather effects the running very bad. I was just there in thirty-six hours. If I had been an hour late I would have had to have my cattle fed. We were just inside of the thirty-six hour law.

Redirect examination by Mr. AITKEN:

It was two years before when they loaded the dead freight on my train out of St. Paul. They did not load any dead freight out of St. Paul this year; they loaded that at Mobridge, and I carried that through to Chicago, eleven loads. It would have made a difference if we did not have the dead freight; we made an awful kick about putting on dead freight.

Recross-examination by Mr. HARTMAN:

Q. In other words the lighter load the faster they can go?

A. Yes, sir.

87      CHARLES HANSEN, a witness produced upon behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. AITKEN:

I was sworn as a witness in this case. My name is Charles Hansen. I live at Maudlow, in this county. I am thirty years old. I was employed by the plaintiff in this case of Bob Wall vs. Northern Pacific Railway Company on January second, 1912. I had something to do with the shipment of these cattle. I helped load them and helped to bed the car and hay the car—hauled hay and hayed the cars and bedded the cars. I did not help drive the cattle in. I was working for Mr. Wall at that time. My business is ranching. I raise stock in connection with my ranch—beef stock, range stock. I have only had cattle of my own for two years. I have handled cattle for other people pretty near all my life. I was raised on a stock ranch. I saw this bunch of beef cattle that the plaintiff shipped on the second day of January. I helped load them, in fact I saw them before they drove them in too—helped to feed them the day before—I seen them the day before. They were in good shape, fine cattle.

Q. What is your opinion in the light of your experience as a stock man as to whether the weight of the steers that were in that bunch—

By Mr. HALL (interrupting): We object to the question upon the ground that the witness has not been sufficiently qualified  
88      as an expert on the weight of cattle—while he has testified to being around where cattle were to a certain extent, that wouldn't tend to show he has any experience on telling what the weight of cattle was.

By the COURT: There ought to be some more testimony on the weight of cattle.

WITNESS: I have seen cattle weighed and weighed some myself. I have seen them weighed. I weighed some this fall and I weighed them before I shipped them out of Belgrade. I had not weighed any cattle prior to that.

By Mr. AITKEN: Is that sufficient?

By Mr. HALL: Oh, let him go ahead.

In the light of my experience as a stockman, and in view of the fact that I have weighed cattle, I should say that the average weight of the steers that composed part of this shipment would be about fourteen hundred pounds, just a rough guess. The cows were average good cows, and ought to weigh about thirteen hundred pounds. They were a good bunch of cattle. I don't know exactly what the bulls weighed, of course, I didn't weigh them—they were pretty good size though. I had one bull in that outfit, but I had not weighed it. We loaded these cattle about one o'clock, I believe, in the afternoon of January second, between one and two o'clock anyhow. I went with these cattle to Chicago. I left Belgrade about two o'clock. I

89 know it was two o'clock because I had my watch with me and looked at it. The weather was kind of rough that morning, but it was better a little after dinner; it was a lot better—it was blowing a little in the morning and in the afternoon it was a lot better. It was pretty cold. It must have been a little after four o'clock when I got to Bozeman, around four somewhere. The stock were all right when we got to Bozeman. We remained at Bozeman about an hour or so. The stock were all right when I left Bozeman. We had trouble with one cow—the car door broke and she got her hind legs out and we had to put them back in again—the conductor helped us put them back in—that was before we left Bozeman. It was getting pretty near dark when we got out of Bozeman. It must have been nearly eight o'clock—between seven and eight o'clock when we got to Livingston. They kept us at Livingston about an hour or an hour and a half. I don't know exactly what time I left there. I got to Billings about eight o'clock the next morning, that would be Wednesday morning. We unloaded and fed—we unloaded the cattle and fed them. We loaded up at Billings at three o'clock the next morning. We loaded at three o'clock because we had orders from the yard master to load—that we were going to be pulled out as quick as we were loaded. We pulled out at eight o'clock in the morning. I don't exactly know what the reason for the delay was. As to whether any of the train men explained 90 it to me, there was one that said there was a draw bar pulled out in the train that was ahead of us and we couldn't get out of the yard—that is what I heard from some of the employees of the train. It must have been about noon when I got to Forsyth. We stayed there quite a while, about a couple of hours or better. I don't exactly remember now the reason for the delay there. I believe the conductor told us that the time wasn't up—I don't know whether that was the conductor that had the run or not. I don't really know what time we got to Glendive. They must have kept us at Glendive about an hour—they kept us an hour at every division point, or a little better. I got to Dickinson about two o'clock in the afternoon.

Q. What day do you remember—you left Belgrade on Tuesday—Just to save time if there is no objection to the question I will put is in a leading question.

By Mr. HALL: No objection.

Q. Was it on Friday?

A. It must have been—I have it marked down myself on a paper.

By the COURT: Any memorandum that you made at the time you may examine in giving testimony.

A. (Hands counsel piece of paper.)

Q. That doesn't enlighten us either because that doesn't give us the date.

91 By Mr. HALL: We will admit it was on the fifth.

I got to Dickinson at two o'clock in the afternoon on the fifth. There was one cow crippled then, and there was a few of them down. We stayed there until eleven o'clock the next night—

the sixth. We loaded about that time and pulled out pretty near right away. The quality of the hay furnished us at Dickinson was not very good—it was a little frozen—it was alfalfa hay but it was froze. I don't know who controlled the matter of our starting and stopping. I had nothing to say about it. I was always ready to go when I was told to go. The cattle ate of this hay freely because they were hungry—they ate all they could eat—of course that which was frozen in chunks they couldn't eat that. The railroad company employees furnished me with this hay. I don't exactly remember what time we got to Mandan, but it must have been along towards noon the next morning—in the forenoon some time. I think they kept us there about a couple of hours. The condition of the cattle then was pretty fair—all standing up and seemed to be all right. The cow that was crippled at Dickinson was standing up and all right at that time. She was all right at Mandan. I got into Jamestown in the evening—it was getting dark or was dark when we got there. I really don't know what time I got out of there—it didn't take us very long because we had a cow down and we tried to get her up and the time went fast—it might have  
92      been an hour or an hour and one half for all I know—we were working with the cow all that time. We didn't get the cow up because we couldn't get her up. She was down and we worked on her, and my brother he went and told the yardmaster about it and tried to get them to send an engine down and pull us out and let us unload. I don't know about that of my own knowledge, just somebody told me.

Q. Never mind what somebody told you.

By Mr. HALL: Move to strike that out.

By the COURT: All right.

This was at Jamestown. I got out of Jamestown in about an hour or so—or a little better. I got to Fargo at eight o'clock the next morning. That cow that was down was dead when we got to Fargo. We left it on the car; we didn't know what to do with her because it wasn't our stock—we just left her there and it was unloaded by the railroad employes or somebody—I don't know who it was. I made a statement in writing at Fargo, to the freight agent I believe it was. I signed the statement, defendant's exhibit No. 2 on cross examination. The freight agent or his chief clerk—someone working in the freight house there—in the freight office, wrote it. I believe he asked me to make a statement. He didn't tell me why he wanted me to make it, he didn't say anything about it. We were delayed in unloading at Fargo. The switch was so short at the stock yards there we could only unload two cars  
93      at a time—and we had to wait for them about a half hour before they came with the engine. My brother and myself unloaded the cattle there. We did not have any help to unload them. There was no help there—nobody to be seen that was around there, except the engineer and brakeman. I don't think the brakeman offered to help me—they were switching the cars back and forth. The hay that was furnished there was good, but the water

was awful dirty and muddy. The cattle didn't drink very much of it because it was bad water. We loaded out of there about midnight or a little before. We did not get out as soon as we were loaded, we waited about an hour. They took us to Dilworth, across the river. I don't know exactly how long they kept us there, but they kept us there quite a while. I don't know exactly what time we pulled out of there. It was in the night—early in the morning. I don't know what time we got to Staples. I just marked down on this memorandum where we stopped to feed and how long we stopped at each place. We did not have a good run from Fargo to Staples. We were sidetracked at Dilworth and I couldn't tell whether we were sidetracked or not because we—they didn't have any run—they were running so slow I couldn't hardly tell whether we were sidetracked or not. I stated that I didn't know when I got to Staples, and I don't know how long they kept us there. After leaving

94 Staples we were sidetracked between Staples and Little Falls,—we were sidetracked for six hours at one place. It was

along in the morning when I got to Little Falls. The cattle were not with me when I got to Little Falls. They cut the train in two between Staples and Little Falls and took the last half of the train and went in and put the rest of them on the sidetrack. They put the cattle on the sidetrack. I found that out when I got to Little Falls. I didn't hear anything about them going to take me away from the cattle. I was quite a little while before the cattle arrived in Little Falls. There was lots of the cattle down and one dead when they got to Little Falls. I just left the dead ones on the cars. That was a cow. My brother consulted with the railroad authorities about the situation after getting to Little Falls. I don't know exactly what time it was when I got to Little Falls. It was about two o'clock that afternoon when I got to St. Paul. We did not have a good run. We got unloaded in St. Paul about two o'clock. That was the first time the cattle had been unloaded since they left Fargo. I figured that was about thirty-eight hours—it might have been a little better. We stayed at St. Paul that night and until about nine o'clock the next evening. The cattle were looking pretty fair at that time; they had a good time to rest up—they were looking pretty fair when we left St. Paul. I got to La Crosse about noon. They kept me there about an hour, I should

95 judge. I don't know exactly the time I got out of La Crosse,

but it must have been about one o'clock or so—probably a little better. I got into Savannah sometime in the night. We did not have a good run from St. Paul to Savannah, we didn't have any good run at all. There was one of the cattle down when we got to Savannah. We told the yardmaster about it and he asked us how it would be to pin her up—anyhow he furnished us lumber to pin her up with and we did. They treated us nice at Savannah. I got to Montgomery about eleven o'clock the next morning. The cattle were unloaded there, all except the one that was down at Savannah. That was the first time they were unloaded since leaving St. Paul. That was thirty-eight hours. The cow that was down when I reached Montgomery died in the car—we fed her on the car and watered her

but she died on the car, at Montgomery. We went to Chicago after we got unloaded and had fed them—I stayed in Chicago and my brother went out and got the cattle and came in with them from there on. I stayed in Chicago because I got sick. I didn't go back to Montgomery and get the cattle, I was sick and I went to see a doctor and he told me not to go. I didn't go to Montgomery. I saw the cattle next in the stockyards of Wood Brothers' pens at Chicago. They looked awfully gaunt and rough—lots of them were crippled—two or three cows that were crippled—they looked terrible

as compared with the way they looked when they left Bel-  
96 grade—a person wouldn't have thought they were the same cattle.

Q. What did the seller have to say about them?

By Mr. HALL: We object to that as hearsay.

By the COURT: Sustained; to which ruling of the court the plaintiff duly excepts.

Q. Did you have any trouble about getting your cars sanded along the road anywhere.

By Mr. HALL: We object to that—no allegation in the complaint of damage because of having trouble getting sand.

By the COURT: That wouldn't contribute to the delay.

By Mr. AITKEN: I know it wouldn't but they said yesterday that the cars were slippery from the icy condition of the cars—we want to show it on that account.

By the COURT: I don't think that is material either way.

By Mr. AITKEN: We are not insisting upon it. That is all.

#### Cross-examination.

By Mr. HALL:

I haven't been working for Mr. Wall. I worked for him a couple of years back for a while. I was just working for him at the time I took these cattle down to Chicago. I have not a ranch of my own, but I lease a ranch. I am not working for Mr. Wall at the present time. My brother is working for him at this time. I didn't help drive the cattle into Belgrade the morn-  
97 ing that he shipped. It was a kind of a rough morning. I have had cattle of my own for about two years, about 125 or 30 head. I have another brother that is interested with me. I weighed some cattle last fall at Belgrade on the Milwaukee scales. I shipped a carload of cattle last fall to Wood Brothers, Chicago. They were stock and steers, one four year old and one three year old. There was one that weighed 1,535 pounds, the four year old. The three year old weighed fourteen hundred or a little less—1,375 I believe. There was one cow that weighed 1,400 or a little better—that was a good cow, of course. The average weight of my cows was about thirteen hundred, I guess. I just weighed a few of them. I weighed these particular few because I wanted to know the weight of them and then see how much they weighed when they got to Chicago, I only shipped two steers. I weighed both of them, one three

year and one four year old steer. I shipped these in November. I shipped twenty-five head all told. One cow weighed fourteen hundred, and I didn't weigh the balance of the cows. That was the best cow in the bunch, I expect it was or else I wouldn't have weighed it. This four year old steer was a good steer, not extra fat, however, but a pretty good steer, pretty size. They were all cows except two, I shipped one bull, too. These bulls that were shipped with Mr. Wall's last year was just a small bull—a little over twelve hundred  
98 pounds. I don't know how old he was—just a three year old.

I should judge the ones we put in with Mr. Wall's was about twelve hundred out here. The other bull that I loaded last fall weighed sixteen hundred or a little better. Of the two bulls shipped with Mr. Wall, one was an awfully big bull and one was a little smaller. I believe the smaller one that I shipped with Mr. Wall would weigh a little over twelve hundred. The steers that Mr. Wall shipped would not weigh as much as the biggest bull, one was an extra large bull. I think that the steers would weigh more than the other bulls. He weighed a little better than twelve hundred pounds—a rough guess. I don't know how old he was—just a three year old. I would judge her about twelve hundred out here—the one we put in with Mr. Wall's cattle. The other bull that I loaded last fall weighed sixteen hundred or a little better. One of the bulls put in with Mr. Wall's shipment was a very large bull. I believe the smaller one weighed a little over twelve hundred. The steers that Mr. Wall shipped would not weigh as much as the biggest bull, but I think the steers would weigh more than the other bulls. He weighed a little better than twelve hundred—a rough guess. That shipment made by Mr. Wall was the only one I ever went back with. I know the customary number of stock put in a standard car. I have helped to load several times, and we always put 25 in each car  
99 of medium sized cattle. I think I could put 25 head of stock that would average fourteen hundred pounds in each car.

Most of the cattle were muley—some had horns—the larger part of them had horns. The bulls had horns—not the one that I shipped—that was a muley one. The big one had horns. The cow did not get her feet out of the car at Bozeman; that was between Stores and here. The conductor and me and my brother went back and got her up. They repaired the car at Livingston. I arrived at Billings about eight o'clock in the morning and unloaded there. I don't know whether the local freight I was on went any farther than Billings—that is as far as we went with them at that time. I believe it was three o'clock when we loaded out of Billings, three o'clock the next morning. I believe we had the cars loaded at Billings at three o'clock, around there anyway. As to whether when I got down to Billings I asked them to give me some new cars, I didn't say anything about it but they gave us new cars, four new cars—they were just as bad as the others were—they weren't new. They were fresh cars. When I say they were just as bad as the others, I mean they were old cars—the only thing that door wasn't broke—there was one door broke in the others and there were several that we had to use baling wires to tie the doors together—used it on the cross bar inside

of the door. We wired that cross bar up when we arrived at Billings. As to whether it was because of this complaint that they gave me new cars at Billings, the doors were all right in the other—in 100 the cars they gave us at Billings—some of the places where they put the pins in were pulled out and we had to put wire in. The stock didn't get out of any of the cars any more. As to the occasion for the delay in Billings after I got loaded and before I started out, one of the employees said there was a Burlington train pulled a draw bar out and they were in the yard there and couldn't get out. I didn't hear them say anything about their passenger trains coming from the east and that they had to wait to meet them. The weather was not cold there. I don't think it was chinooking there. I don't exactly know, but I think it was below zero. I didn't stay on any caboose in Billings—we were around town and in the hotel while we were in Billings—there was no caboose down there. I don't know what caused the delay at Forsyth, only I heard the conductor or some of the employees state that the time wasn't up yet, I expect that the crew that was to pick me up at Forsyth hadn't had the rest required by law before they could start work again. When I got to Dickinson there was one cow crippled. She was knocked down, I guess, and stepped on—the rest of them stepped on her. I had about twenty-five head of cattle in that car. It is possible with a car loaded to that capacity when an animal gets down to get it up again. They get down and we punch them until they get up.

Q. Unless you get in there and prod them and separate the 101 other animals apart to give the one that is down room, they can't get up of themselves?

A. They generally get up themselves—

Q. Did you ever see any of them get up themselves after getting down?

A. I said they could.

Q. Did you ever see an animal get up after once got down in a car loaded with twenty five head?

A. They get up themselves all the time.

Q. Did you ever see one? That is where they are not helped by somebody prodding and spreading them apart?

A. No sir.

I got into Dickinson about two o'clock in the afternoon of Friday and left there at eleven o'clock the next evening. As to whether I asked or made any demand to go ahead prior to that time that they notified me there was a train there to take me, yes sir, we asked them right along whenever we had to load—we were ready for them. They told us they would take us out on the first train they could get. I don't know whether they did that or not, there were lots of trains running. The weather was cold at Dickinson. I believe the hay was furnished by the Hay and Grain dealer in town, some drayman hauled it down there. As to whether in other words when you ship stock you wire ahead that you want to arrange for the purchase of hay, I didn't wire ahead. I don't suppose this hay that was furnished was owned by the Northern Pacific. It was furnished

102 by the Northern Pacific, however. I expect it was charged to my bill by the Northern Pacific. The drayman hauled the hay

down. The hay hadn't been unloaded until after I got there. The drayman drawed it right down there and we helped feed them there. He was down there with the hay when I got there and had decided what pen to put the stock in; he was down there with the hay. He was down there ready to furnish the hay as quick as the cattle got there but as a matter of fact the hay was still on his wagon until after I got my stock in the pens. The objection I had to this hay was that some of it was frozen around there at that time. I expect pretty near everything was frozen around there at that time, but hay shouldn't be frozen through. The cattle ate all the alfalfa except the chunks that were frozen. I don't know exactly how long they kept me at Mandan—must have been a couple of hours. I kept no record of the time of the arrival and departure except at points where I fed. All my records about Mandan and Forsyth and other places is simply from memory now. I don't remember exactly how long I was at Jamestown, because there was a cow down and that took up our time. We were trying to get the cow up all the time. I didn't make any request to unload the stock there. I didn't make any complaint in the statement that I signed at Fargo about not being allowed to unload at Jamestown—it was all made out for us.

103 When I got to Fargo I was present in the freight office with my brother when he was talking with Mr. Johnson, the agent about this cow. I explained about this dead cow—told him about the dead cow. My brother stated in that conversation that the company wouldn't allow me to take this cow out at Jamestown. As to whether they suggested to me then that if I had a complaint to make about this cow that I had better reduce it to writing—make a written statement of the facts regarding the cow, they wrote this out and asked me to sign it. I was supposed to explain in that written statement the facts concerning the handling of this cow that was dead. I read that over before I signed it.

Q. Now as to unloading there at Fargo—you say there wasn't sufficient switch—what you meant is there was only two chutes.

A. Just one chute.

There was only one chute and they unloaded first one car and then backed it out and backed the other down—and then they backed them up to the train and then took the other two down—the rest of them and unloaded them the same way. I mean to say they went clear back to the train—the switch wasn't long enough at the stock yard—there was room for only two cars at the stock yards—just two pens at the stock yards. That is not a regular feeding pen but simply a place where they feed when they run up against the thirty six hour law.

104 Q. What they did was they took the engine and uncoupled the four cars of stock from this train and ran them up to the stock yard which is about a mile isn't it?

A. It is right at the edge of the town.

They had to shove one car down at a time in front of this chute. That is what caused the delay in unloading. We were right there to unload them—it didn't take us long to unload them after they got them down there. The reason I had to unload at Dickinson

was because they didn't have time to go on to Sunnyside within the thirty-six hours. I stayed in Dickinson from two o'clock until about eleven o'clock the next night; two o'clock in the afternoon is when I got to Dickinson and I left there at eleven o'clock the next night. We were ready to go out any time but we had to wait until they got ready to pull us out; in other words, I had to wait until a freight came along. I don't know how long it took us to run from Fargo over to Dilworth, but it didn't take them very long—they ran a switch engine—just took a switch engine and took the cars over across the river. It is only three or four miles, or a little better, from Fargo to Dilworth. Dilworth is the divisional point but they stopped my stock at Fargo to feed them there. A switch engine took me to Dilworth so I could be attached to the train that went on east. I don't know whether the train had any trouble in getting started after leaving Dilworth. I don't know *don't*

105 *know* that it is a fact that on account of the cold weather they had a couple of engines on my train and they worked two or three hours to get started out of Dilworth after I was loaded on it. I — whether they had more than one engine or not, and I don't know what was the cause of the delay, if there was any unreasonable delay, at Dilworth. After I was taken over from Fargo to Dilworth I believe my four cars of stock were attached to the front of the train, and that was the way they were taken down to Little Falls, I expect, or until they side tracked us. When we left Dilworth they had them up in front. I don't remember when they got to Crandall. As to whether I remember of having gotten to a station where they stopped to meet number one and I was held there about an hour and fifty minutes, they had to make one stop in there but I don't know what station it was. As to whether I remember after No. 1 had passed that the engineer had to uncouple and run into Little Falls, to get water, they had some trouble but I don't remember what it was. I don't remember of the engine having to run ahead and get water. I remember that the engineer found it necessary—or at least he cut his train in two and pulled part of his train from Crandall over to Little Falls or Darling, and then an hour or so afterwards another engine pushed in part of the train to Little Falls. The second engine brought in the other

106 half of the train up to Little Falls. It came up shortly afterwards—it must have been another engine that pulled it up.

It was two o'clock in the afternoon that I got unloaded in South St. Paul. We got to the terminal for the Northern Pacific there in St. Paul at two o'clock, that was when we unloaded. At two o'clock I was at the chutes ready to unload. I just kept the time where we unloaded. That was two o'clock of the afternoon of the tenth. They kept the stock there until eleven o'clock the next evening. As to whether I could have started earlier than that if I had wanted to, the stock were in such bad shape we had to let them rest up. The yardmaster thought it was the best thing for us in order to make a good run to Chicago to keep the cattle there until the next day instead of starting out within the next six or eight hours. If my stock had been in condition then I could have left

St. Paul eight or ten hours later and then the only market I could have reached in Chicago would be the Saturday morning market. There is a market on Saturday morning. As to whether I was over down there on Saturday to sell stock, it was the first of the week when I went there. I am sure there is a market for stock on Saturday; I am sure there is some stock sold. As to whether I remember when I got to Aurora on the thirteenth; that is, when I got down from St. Paul, we unloaded at Montgomery about eleven o'clock that next morning. I went to Aurora first. I had to switch off two miles, I think, to the feeding place in Montgomery. It 107 must have been later than seven thirty when I got to Aurora that morning, because they didn't keep us very long in the yard there. I don't remember just when it was I got to Aurora. The reason I had to switch back to Montgomery was because I didn't have time to go into Chicago within the thirty six hour limit and I had to stop there and feed.

Q. Even if you were in Aurora at 7:30 on Saturday morning, and the thirty-six hour limit would not have interfered you couldn't have gotten your stock into Chicago in time for the Saturday morning market?

A. It was only a short distance.

Q. It would take from two and one half to four hours to have made it to the end of the Burlington and up to the—to get the stock through the yards and up to the stock yards in Chicago. Strike that out. I will make it more plain. It would take from two and one half to four hours after you got to the end of the railroad, to get the stock through the yards and up to the stock yards in Chicago?

A. I don't know—that is the only time I went down, and I wasn't with them at that time.

These cattle were gaunted and in a crippled condition when I got to Chicago. I have never seen any other shipment of stock that went from Montana to Chicago. I never seen a shipment of stock that went in the fall when it wasn't cold weather; I never took much interest in the cattle shipments before. These bulls were not tied up in the cars.

#### 108 Redirect examination.

By Mr. AITKEN: I didn't go with my own cattle on the Chicago market only just this one shipment. The hay that they delivered to me at Dickinson was frozen. It was in bales; that is the reason I didn't know what it was before we opened the bales. The expressman was gone before I opened the bales. It looked pretty good from the outside—in baled hay you can't tell until you have opened it what it looks like or what its condition is. The agent at Fargo didn't ask anything about whether or not I asked to have this cow unloaded at Jamestown—in fact it was my brother that was talking to the agent about it anyway. He never asked me anything about it.

W. O. BOHART, a witness produced upon behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. AITKEN: My name is W. O. Bohart. I live two miles north of Bozeman—three miles I guess it is. My occupation is farming and dairyman at present. I have resided in this neighborhood off and on for about thirty years, thirty-three. I had occasion in the month of February, I think, to make a shipment of stock from the east to Bozeman. I made a shipment at that time. I shipped some cattle I got in the east; I think there

109 were nine or ten head. They were in a car by themselves.

Q. What was the situation—what was the state of the weather at the time you made this shipment?

By Mr. HARTMAN: We object if your honor please; I don't think that the condition of the weather in February 1912 when this gentleman made a shipment of cattle from the east to the west is at all material in this case.

By the COURT: I don't think so either.

By Mr. AITKEN: The whole defense here your honor is by reason of the cold weather this stock were damaged; now I wish to show by this witness that he shipped stock in quite as cold weather.

By the COURT: I will let you go ahead and if it is not material I will strike it out later, overruled for the present; to which ruling of the court the defendant duly excepts.

A. Well sir when I started—

By Mr. HALL: We object to this unless the witness shows that the weather was practically the same—the temperature was practically the same that time as it was this time; we object to any general statement of cold weather.

By Mr. AITKEN: I will qualify him.

It was thirty-five below zero when I started. The weather continued that cold for three or four days. I started from Honeycreek, Wisconsin, and I reached Bozeman on the tenth of February, I think it was. I left on the second and reached Bozeman on the tenth, over the Northern Pacific. I was on a local freight, supposed to be a local freight. I couldn't be right positive about the number of it, but I think they call it sixty-nine or one hundred and sixty-nine or six hundred and nine or six hundred and eight; some of those figures were in it I know. I arrived in Bozeman on the tenth. It was considerably milder weather when I reached Bozeman, if I remember right, the water if I remember right was running that day, muddy. For three or four days after I started the weather was continuously very cold, clear up to when we struck the Montana line. It was between twenty-five and thirty-five degrees below zero, to the best of my recollection. I made a shipment in December, 1912, from the same point. This shipment was twenty head of cattle.

Q. What was the condition of the weather at the time you started with that shipment.

By Mr. HALL: We object to the December, 1912, shipment for the same reason; it is immaterial what was the experience of this witness in shipment of cattle at other times; it has no bearing in this case.

By the COURT: I think all of this testimony is irrelevant and immaterial; will sustain the objection; furthermore the whole testimony of the witness regarding other shipments is ordered stricken out—and the jury are ordered not to consider it.

111 By Mr. AITKEN: I desire to make an effort to prove.

(Offer of proof dictated to stenographer outside of hearing of the jury, as follows:)

*Offer to Prove.*

By Mr. AITKEN: The plaintiff now offers to prove by the witness W. O. Bohart that in January, 1912, when the temperature was from 25 to 35 degrees below zero he, the witness Bohart, made a shipment of live stock from Honeycreek, Wisconsin, over the Northern Pacific railroad when the temperature was from 25 to 35 degrees below zero for five or six days; that he started from Wisconsin on February fourth and reached Bozeman, Montana, on February tenth, 1912. Plaintiff also offers to prove by the witness Bohart that he made a shipment of live stock from Honeycreek, Wisconsin, in December, 1912, when the weather was very cold and that the said shipment consisted of one carload of cows and that he reached Three Forks, Montana, over the Milwaukee railroad within six days after the shipment started from Honeycreek, Wisconsin.

By Mr. HALL: We object to the offer on the grounds stated in the objection to the question; I don't know what the offer is however.

By the COURT: Offer denied.

To which ruling of the Court the plaintiff duly excepts.

112 No cross-examination.

By Mr. AITKEN: We now offer in evidence plaintiff's exhibit No. 4 being a letter from Wood Brothers Live Stock Commission Merchants to C. A. Perry F. C. A., Northern Pacific Railway, St. Paul, Minn., dated January 25, 1912.

B<sup>y</sup> Mr. HALL: No objection.

(Exhibit No. 4 attached to back of transcript.)

By Mr. AITKEN: Plaintiff now offers in evidence plaintiff's exhibit No. 5, being a letter from Wood Brothers Live Stock Commission Merchants, Chicago, Illinois, dated February 9, 1912, to J. F. Horrigan, F. C. A., Northern Pacific Ry., St. Paul, Minn.

By Mr. HALL: No objection.

(Exhibit No. 5 attached to back of transcript.)

By Mr. AITKEN: Plaintiff now offers in evidence plaintiff's exhibit No. 6, being a letter from Walter Aitken, Attorney at Law, Belgrade, Montana, addressed to Mr. J. F. Horrigan, F. C. A.,

Northern Pacific Railroad Company, St. Paul, Minn., being a letter dated March 6, 1912.

By Mr. HALL: As to the letter we will admit that that letter was received by Mr. Horrigan, but object to it as being wholly immaterial, incompetent and irrelevant, to any issue in this case; and we object to this letter upon the further grounds that the claim for damages of the plaintiff had already been made in a letter of 113 plaintiff's agent, Wood Brothers Commission house, and that correspondence between the counsel for the plaintiff and the Freight Claim Agent of the Northern Pacific thereafter is wholly immaterial for any purpose in this case and is incompetent.

By the COURT: Overrule the objection. To which ruling of the Court the defendant duly excepts.

By Mr. AITKEN: Plaintiff now offers in evidence plaintiff's exhibit No. 7, being a letter dated March 28th, 1912, from J. F. Horrigan, F. C. A., to Mr. Walter Aitken, Attorney at Law, Belgrade, Montana. Mr. Aitken here states that this letter was received by him personally in reply to a letter being plaintiff's exhibit No. 6, which has heretofore been introduced in evidence.

By Mr. HALL: We make the same objection to the offer of this as was made to the other letter as irrelevant, incompetent and immaterial.

By the COURT: Overruled; it is admitted; to which ruling of the Court the defendant duly excepts.

By Mr. AITKEN: I will now read exhibits four, five, six and seven to the jury.

(Exhibits read to the jury.)

(Title of Court and Cause.)

Stipulation for the taking of the depositions of Charles A. Wood and Albert J. Labarthe, entered into between counsel for the respective parties to this action on the 12th day of December, 1912.

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*Certificate.*

STATE OF ILLINOIS,  
*County of Cook, ss:*

I, Ralph Kennedy, a Notary Public, in and for the said County of Cook, State of Illinois, do hereby certify that the witnesses, Charles A. Wood and Albert J. Labarth, in the foregoing depositions named, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said depositions were taken at the time and place mentioned in the annexed stipulation, to-wit: At my office in Rooms 1 and 2, Exchange Building, Union Stock Yards, Chicago, Ill., and on the 3rd day of January, 1913, between the hours of ten o'clock A. M. and four o'clock P. M. of that day; that said depositions were reduced to writing by A. J. Flanagan, and when completed were respectively by me carefully read to each of said witnesses, and being by him corrected, was by him subscribed in my presence.

In making his answer to Question 3 of direct interrogatories, the witness, Charles A. Wood, was obliged to refer to records in order to refresh his memory, which record is attached hereto marked exhibit "A."

In making his reply to Question 12, he also referred to a market paper, which is attached hereto, marked Exhibit "B."

In answering Question 16 he also referred to a postal card which is attached hereto, marked Exhibit "D." Also a copy of a  
115 letter attached hereto marked Exhibit "C."

In witness whereof I have hereunto subscribed my name and affixed my official seal, this 9th day of January, 1913.

RALPH KENNEDY,  
*Notary Public in and for the  
County of Cook, State of Illinois.*

My commission expires May —, 1916.

By Mr. AITKEN: I will now read the deposition of Charles A. Wood.

(Title of Court and Cause.)

My name is Charles A. Wood. I reside at 6828 Normal Avenue, Chicago, Illinois. My age is forty years, and I am a commission merchant. I am a member of the firm of Wood Bros., Live Stock Commission Merchants, Union Stock Yards, Chicago, Illinois, and I recall the shipment from Mr. R. J. Wall, of Belgrade, Montana, in the month of January, 1912. By referring to our records in order to refresh my memory, there were forty three steers, fifty-one cows, three bulls and one dead animal arrived here in a shipment consigned from R. J. Wall, of Belgrade, Montana, and I first saw the shipment when the cattle were put into the pens after being unloaded out of the cars. There was one animal arrived dead in Chicago Union Stock Yards. There was also one dead animal that was taken out of the shipment at St. Paul Stock Yards, Minnesota. The condition of the cattle as

116 to general appearance was that they were gaunted and emaciated and more or less bruised. I had charge of the selling of all of the steers in this shipment, which amounted to forty-three head. I have been selling Montana beef cattle at the Union Stock Yards in Chicago for about eighteen years. This shipment of cattle arrived in bad shape, as they were bruised and very gaunted, which injured the sale of the cattle, as they would have brought considerably more money if they had arrived in the normal condition of the average shipments that come from the state of Montana. As to whether there was more than the average shrinkage in the weight of these cattle, these cattle looked in a very gaunted condition and their appearance gave every evidence of rough usage and a very long trip. These cattle looked to have a very excessive shrinkage over and above the average shipment, as they were in a very gaunted condition. These cattle had to sell from twenty-five cents a hundred less on account of their gaunted and bruised condition.

Q. 11. Was there any apparent shrinkage in the weight of said cattle, over and above the average of the same class of cattle, and if so, how much?

A. There was every evidence of extra shrinkage on these cattle and they were in a very gaunted condition.

By Mr. HALL: Let the record show by agreement of counsel that question twelve and the answer thereto in the deposition of  
117 Charles A. Wood—question twelve of direct interrogatories is stricken out by agreement and the answer thereto, and also the last sentences—or the last three lines of the answer to direct interrogatory thirteen be stricken out by agreement.

Q. 13. Based on your experience and of your knowledge of the market prices on the Chicago cattle market on January 9, 1912, and on January 15, 1912, what was the loss to Mr. Wall, over and above what is usual if any on account of depreciation in the appearance of said cattle? State fully how you make the estimate? State, also, the amount of loss on account of shrinkage, if any, over and above the average. Give a full statement of these points and figures as nearly as you can, include entire shipment, steers and cows.

A. I only sold the forty-three head of steers which arrived in this shipment, and on account of their general appearance they sold twenty-five cents per hundred pounds less than they would have had they arrived in good condition.

I do not know the exact time which it takes for a shipment of cattle to reach the Union Stock Yards, Chicago, shipped from Belgrade, Montana. The firm of Wood Brothers presented a claim to the Northern Pacific Railway on January 25th, 1912, on account of a claim against the railroad on this shipment of Mr. R. J. Wall which arrived here and *were* sold on January 15, 1912.

The firm of Wood Brothers wrote out a claim and mailed  
118 the same to the Northern Pacific Railway on January 25, 1912. The firm of Wood Brothers mailed the original claim to the Northern Pacific Railway on January 25, 1912, a copy of which is attached to this deposition, marked Exhibit "C." We received a reply from the Northern Pacific Railway on February 1st, 1912, stating they had received the correspondence and giving us their claim number L. S. 4323. Card of acknowledgement attached hereto marked Exhibit "D." The loss on this shipment of cattle would be about forty cents a hundred pounds, and the extra shrinkage would be about twenty-five pounds for each extra day that they were en route over and above the usual time which cattle occupied during the trip in transit from Belgrade, Montana, to Chicago.

By Mr. HALL: We object to part of that answer upon the ground that the—that it appears from the answer of witness in questions twelve and thirteen that his figures in the first part of that includes a loss on market variations.

By Mr. AITKEN: If there is a variation in the testimony the jury can determine that.

By Mr. HALL: He is asking for loss of appearance and also for

market variations; he put its all under appearance; we object to it further that the answer is not responsive to the question.

By Mr. HARTMAN: And also on the ground that under the allegations of the complaint they cannot recover for any loss of market.

119 By the COURT: Overruled. To which ruling of the Court the Defendant duly excepts.

As to what was the loss on account of dead cattle, there were two cows arrived dead in this shipment, one being taken out at St. Paul, the other at Chicago and the average weight and average price of these two animals would amount to one hundred and seven dollars and nine cents loss.

Q. 20. Please state, if you know, the amount of freight paid on this shipment of cattle, by Mr. Wall, or by the firm of Wood Brothers, for his account. If there were various items given them separately and to whom each was paid.

By Mr. HALL: We object to that as immaterial.

By the COURT: Sustain the objection. To which ruling of the Court the plaintiff duly excepts.

By the COURT: I will have to sustain it unless your complaint is an attempt to recover for freight.

#### Cross-interrogatories:

Wood Brothers, Live Stock Commission Merchants, of Union Stock Yards, Chicago, solicit from stock growers in Montana, and elsewhere, the shipment of live stock to their firm, to be handled and sold by them on commission. There are several other firms at the Union Stock Yards soliciting the same class of business and in competition with my firm. The plaintiff in this case is a customer 120 of my firm. I have had about eighteen years' experience in receiving and selling Montana cattle on commission at Chicago. I have handled a great many shipments of cattle from Gallatin County, Montana, personally, upon their arrival in Chicago, within the last few years. It would be hard for me to state the exact number. As to whether I have had any experience in examining or comparing shipments of Montana cattle before, or at the time of, their departure from Montana, I have received shipments of cattle that were weighed in Montana and also in Canada that were weighed before being loaded in the cars in the State of Montana and also in Canada, and when they were sold and weighed in Chicago I have compared the shrinkage of the shipments. I can compare the conditions of various shipments of Montana cattle upon their arrival at Chicago without knowing their condition before leaving Montana. The usual or normal shrinkage of cattle is about ten per cent. per hundred weight, where they receive the usual and ordinary run given shipments of live stock from the part of Montana from which these cattle were shipped. All shipments do not shrink alike, but the average shrinkage is about ten per cent. or a little less. If the cattle are not weighed at the point of loading you cannot tell the exact shrinkage to a pound, but men of experience can give a very close

estimate. If you do not know the weight of cattle at the time they are loaded in Montana, it is a fact that any shrinkage in excess of the usual or normal shrinkage upon their arrival in Chicago is based wholly upon a guess or conjecture as to what the cattle may have weighed at the point of loading in Montana. As to whether my estimate of shrinkage is largely based upon the shipper's estimate or guess as to the weights of the cattle at the time of loading, we have actual cases where shipments were weighed in Montana and shipped to the Chicago market where the weights compared after the cattle were weighed in Chicago, with the original weights at the point of original showed the exact shrinkage. If I do not know what the cattle weighed when loaded, I can only determine the amount of shrinkage they sustained by comparing with other shipments which have come to this market. If the cattle in question were received by the Chicago, Burlington and Quincy Railroad at St. Paul too late to get them onto the Friday market of January 12th, and were unloaded in Montgomery and given proper feed and water until such time as they could be loaded to reach the Monday morning market of January 15th, their shrinkage or appearance would not be any worse than if they had been rushed through to Chicago and held there over Saturday and Sunday for the Monday market. As to how the Saturday market compares with the Monday market, there is practically no cattle marketed here on Saturday. It is a fact that extremely cold weather has a market effect on cattle carried in open stock cars, and causes an extra depreciation in appearance and also an extra shrinkage. If these cattle encountered severe storms, with the temperature several degrees below zero during their entire transportation across the State of North Dakota, and if the cattle encountered storms and were delayed along the road a period of time, it would naturally make them gaunted and emaciated more than if they had come straight through without being stopped and a delay in transit.

*Deposition of Albert J. Labarthe.*

Direct interrogatories:

My Name is Albert J. Labarthe; my age is thirty-two years and my residence is 6606 Monroe Avenue, Chicago, Illinois. My occupation is cattle salesman for the firm of Wood Brothers, Chicago. I had something to do with the sale on the Chicago market, on or about January 15, 1912, of all of a part of a certain shipment of four carloads of cattle to Wood Brothers, Live Stock Commission Merchants, from R. J. Wall, of Belgrade, Montana. I first saw these cattle in question when they were delivered in our sales pens where we sell all cattle consigned to us. As to what experience I have had in the handling and selling of cattle on the Chicago market, especially Montana beef cattle, as near as I can remember I have sold Montana cattle for the past six years or more. In the light of my experience in handling and selling such cattle on the Chicago market, and as to the condition of the R. J. Wall

cattle, as compared with the average run, at the time I first saw them, and at the time I sold them, or any part of them, as to appearance, shrinkage and general condition, these cattle showed evidence of being long in transit and were very gaunted from the lack of proper attention and also the appearance of being emaciated and bruised. The depreciation in appearance of the cattle was approximately forty cents per hundred pounds in market value. I attribute the condition of the cattle to the unnatural condition of being long in transit and not having proper care, or rather feeding, that cattle would have in being a short time on the road.

Q. 8. Were there any dead cattle among the shipment referred to and, if so, how many, and what would have been their value alive as compared with their value dead.

A. Assuming that the dead animals were an average of the cattle that were sold alive, the difference in value would be what the cattle brought on the market and what we were allowed for the carcass.

By Mr. HALL: We object to question nine and the answer thereto.

By Mr. AITKENS: We do not insist upon it.

By the COURT: Question nine and the answer are both omitted from the deposition.

124 By Mr. HALL: The same objection to question ten and answer.

By Mr. AITKEN: It may be omitted.

#### Cross-interrogatories:

Wood Brothers, Live Stock Commission Merchants of Union Stock Yards, Chicago, solicit from stock growers in Montana and elsewhere the shipment of live stock to their firm, to be handled and sold by them on commission. There are other commission firms at the Union Stock Yards soliciting the same class of business, and in competition with my firm. The plaintiff in this case, R. J. Wall, is a customer of my firm. The firm of Wood Brothers has had experience in receiving and selling and handling live stock, or Montana, cattle, since 1865 I have had experience in selling Montana cattle for the past six years or more. It is rather hard to state definitely how many shipments of cattle from Gallatin County, Montana, I have personally handled and examined upon their arrival in Chicago within the past few years, but we have handled a great many. I have not had any experience in examining or comparing shipments of Montana cattle before, or at the time of, their departure from Montana. I can not compare the conditions of various shipments of Montana cattle upon their arrival at Chicago unless I know their condition before leaving Montana. The normal shrinkage of cattle is about ten per cent per hundred weight, approxi-

125 mately, where they receive the usual and ordinary run given shipments of live stock from the part of Montana from which these cattle were shipped, about ten per cent or less. As to whether, if cattle are not weighed at the point of loading, it is not impossible to tell what the shrinkage is on arrival in Chicago, a man of experience in handling range cattle can approximately tell the per cent of shrinkage, but as to the exact amount it is practically impossible

for one to do so unless weighed at point of shipment. If I do not know the weight of cattle at the time they are loaded in Montana, it is a fact that any estimate of shrinkage in excess of the usual or normal shrinkage upon their arrival in Chicago is based wholly upon a guess or conjecture as to what the cattle may have weighed at the point of loading in Montana. As to whether our estimates of shrinkage are based largely upon the shipper's estimate or guess as to the weights of the cattle at the time of loading, our experience in estimates is based upon comparisons of cattle that have been weighed at the loading point and weighed here after the sale has been made. That is the basis we use in estimate shrinkage. If I do not know what the cattle weighed when loaded, the only way by which I can determine the amount of shrinkage they sustained is by comparison with other shipments on which we have had actual weights. If the cattle in question were received by the Chicago, Burlington and Quincy Railroad at St. Paul too late to get them onto the

126 Friday market of January 12th, and they were unloaded in Montgomery and given proper feed and water until such time as they could be loaded to reach the Monday morning market of January 15th, their shrinkage or appearance would not be any worse than if they had been rushed through to Chicago and held there over Saturday and Sunday for the Monday market. As to how the Saturday market compares with the Monday market, there is practically speaking no cattle market here on Saturday. It is a fact that extremely cold weather has a marked effect on cattle carried in open stock cars, and causes an extra depreciation in appearance and also an extra shrinkage. If these cattle encountered severe storms, with the temperature several degrees below zero during their entire transportation across the State of North Dakota, it would have a very serious effect in the appearance of the cattle, as it affects the hair, the hair turning the wrong way, making them have a stale appearance, and also the animals are chilled and it results in their having a very gaunted appearance, which results in a heavy shrinkage.

By Mr. AITKEN: Let the record show that the captions and the certificate of the Notary Public are also read in evidence.

By Mr. AITKEN: I desire to offer in evidence the folders which show the entire distance from St. Paul to Chicago and the distance from different division points.

127 By the COURT: Perhaps you can stipulate or agree as to the distances.

By Mr. HALL: Our train sheets I think show the distance.

By Mr. AITKEN: I probably can get that from the cross examination of your witnesses.

By Mr. AITKEN: That is all.

The following are copies of the exhibits that were attached to the depositions of C. A. Wood and A. J. Labarthe.

## EXHIBIT THREE ATTACHED TO DEPOSITION OF C. A. WOOD.

*Reply to Question Three of C. A. Wood.*

James Wood, Walter E. Wood, Kay Wood, Charles A. Wood.

Wood Brothers.

Established 1867.

Telephone  
Yards 548.

Live Stock Commission Merchants.

Chicago, So. Omaha, Sioux City, So. St. Paul.

UNION STOCK YARDS, CHICAGO, 1-15-1912.

Sold for Acct. of Robt. J. Wall, P. O. Belgrade, Mont.

Shipped to R. J. Wall.

| Date. | Purchaser.  | Cattle. | Class. | Brand. | Wt.    | Off.   | Amt.     | Total.            |
|-------|-------------|---------|--------|--------|--------|--------|----------|-------------------|
|       | S. & S. Co. | 19      | Steers | "      | 21,400 | \$6.00 | 1,284.00 |                   |
|       | "           | 20      | "      | "      | 23,520 | 6.00   | 1,411.00 |                   |
|       | "           | 4       | "      | "      | 3,920  | 5 1/4  | 205.80   |                   |
|       | Hammond     | 14      | cows   | "      | 13,720 | 5.00   | 686.00   |                   |
|       | "           | 25      | "      | "      | 27,060 | 5.00   | 1,353.00 |                   |
|       | "           | 10      | "      | "      | 11,180 | 4.50   | 503.10   |                   |
|       | "           | 2       | "      | "      | 2,160  | 4.00   | 86.40    |                   |
|       | D. Guthman  | 2       | bulls  | "      | 2,360  | 4.60   | 108.56   |                   |
|       | G. R. Co.   | 1       | dead   | "      | .....  | .....  | 5.00     |                   |
|       | "           | 1       | "      | "      | .....  | .....  | 5.50     |                   |
|       |             |         |        |        |        |        |          | <u>\$5,648.56</u> |

(Copy.)

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| Car No.            | Weight. | Rate.  | Amount.              | Freight including terminals. | 838.83        |
|--------------------|---------|--------|----------------------|------------------------------|---------------|
| 8020               | 24,200  | 63 1/2 | 153.67               | Yardage                      | 24.00         |
| 62593              | 25,000  | "      | 157.75               | Hay lbs.                     | 31.90         |
| 62700              | 26,200  | "      | 166.37               | Bedding                      | .....         |
| 63741              | 25,400  | "      | 161.29               | Shipping charges             | .....         |
|                    |         |        |                      | Range charges                | .....         |
|                    |         |        |                      | Commissions                  | 48.00         |
|                    |         |        |                      |                              | <u>943.73</u> |
| St. Paul           | .....   | 54.80  | Net Proceeds         | .....                        | \$4,704.83    |
| Fargo              | .....   | 24.00  | Currency             | .....                        |               |
| Montgomery         | .....   | 41.25  | Directions for money | .....                        |               |
| Ter.               | .....   | 8.00   |                      |                              |               |
|                    |         |        |                      |                              |               |
|                    |         |        | 852.13               |                              |               |
| Less Frt. on Bull. | .....   | 12.30  |                      |                              |               |
|                    |         |        | <u>839.83</u>        |                              |               |

Please write for explanation of anything unsatisfactory.

James Wood, Walter E. Wood, Kay Wood, Charles A. Wood.  
Wood Brothers.

Established 1867.

Telephone  
Yards 548.

Live Stock Commission Merchants.

Chicago, So. Omaha, Sioux City, So. St. Paul.

UNION STOCK YARDS, CHICAGO, 1-15-1912.

Sold for Account of Hansen Bros., P. O. Maudlow.

Shipped by R. J. Wall from Belgrade.

| Date.   | Pu-chaser.   | Cattle. | Class. | Brand. | Wt.                             | Off. | Amt.  | Total. |
|---------|--------------|---------|--------|--------|---------------------------------|------|-------|--------|
|         | D. Duntham.. | 1       | bull   | O4Gh   | 1,504                           | 4.60 | 70.84 | 70.84  |
| Car No. | Weight.      | Rate.   |        | Amt.   | Freight including terminal..... |      | 12.30 |        |
|         |              |         |        |        | Yardage .....                   |      | .25   |        |
|         |              |         |        |        | Hay lbs. ....                   |      | .35   |        |
|         |              |         |        |        | Bedding .....                   |      |       |        |
|         |              |         |        |        | Shipping charges .....          |      |       |        |
|         |              |         |        |        | Range charges .....             |      |       |        |
|         |              |         |        |        | Commissions .....               |      | .50   |        |
|         |              |         |        |        |                                 |      |       | 13.40  |
|         |              |         |        |        | Net Proceeds.....               |      | 57.44 |        |
|         |              |         |        |        | Currency .....                  |      |       |        |
|         |              |         |        |        | Directions for money.....       |      |       |        |

(Copy.)

129 Please write for explanation of anything unsatisfactory.  
(Exhibit B—Answer to Question 12 in deposition by C. A. Wood—is a newspaper report of the market reports for January 15, 1912. Too bulky to copy.)

#### EXHIBIT "C."

January 25, 1912.

Mr. G. A. Perry, F. C. A., Nor. Pac. Ry., St. Paul, Minn.

DEAR SIR: Enclosed find duplicate account of sales for four car-loads of cattle sold by us for account of Robt. J. Wall, Belgrade, Mont., on January 15th. Also certified statement of the Stock Yards Company.

These cattle were billed out at 2 p. m. on January 2nd; were unloaded at Billings and reloaded at 3 A. M. January 4th, and the

train pulled out at 8 A. M. same date. Got to Dickinson about 2 P. M. on the 5th, where one of the cattle was found hurt and quite a few down. Stayed there until the next night, and pulled out about 11 P. M. of the 6th; at Jamestown, N. D., found the cow that was hurt dead, and asked that the car be unloaded, but no attention was paid to request. Got to Fargo about 8 A. M. on the 8th. Was loaded at 11 P. M. and pulled out about midnight. Made very poor time from Fargo to Staples, being sidetracked for six hours, and when the stock arrived at Little Falls one cow was found dead. The 130 shipment was 37 or 38 hours on the road between Fargo and St. Paul. Left St. Paul about 9 P. M. of the 11th, and made very poor time to La Crosse. As Savannah found one cow down. She was penned up there, but died in Montgomery. Unloaded at Montgomery at 11 A. M. January 13th. The cattle arrived in Chicago about 2 A. M. Monday, January 15th.

These cattle were intended for the early market of January 9th and for the loss sustained by reason of the long delay to which the shipment was subjected, we are putting in a claim on behalf of Mr. Wall as follows:

|   |                |
|---|----------------|
| 40c. depreciation in value on acct. appearance of cattle, |                |
| 105,320 lbs. ....   | \$421.28       |
| 150 lbs. shrinkage 98 cattle, 14,700 lbs., at \$5.36..... | 787.92         |
| 2 dead cows, av. wt. 1104 lbs., at \$4.85.....            | 107.09         |
| Feed at Dickinson.....                                    | 58.80          |
| Feed at St. Paul.....                                     | 54.80          |
| Feed at Chicago.....                                      | 31.90          |
| <br>Total.....  | <br>\$1,461.79 |

Kindly see that voucher in Mr. Wall's favor is forwarded to us at an early date, and oblige.

Yours very truly,  
(Signed)

WOOD BROS.

A. J. F.

February 9, 1912.

Mr. J. F. Horrigan, F. C. S., Nor. Pac. Ry., St. Paul, Minn.

131 DEAR SIR: Please refer to your claim no. L. S. 4324, in favor of Robt. J. Wall, Belgrade, Mont., loss sustained by him on shipment of cattle sold by us for his account on January 15th.

We failed to include in the statement item of one dead cow, and also to allow a credit of \$10.50, proceeds of sale of two dead sold here, and desire to amend the same to that extent, making the claim read as follows:

|   |          |
|---|----------|
| 40c. depreciation in value on acct. appearance of cattle,                 |          |
| 105,320 lbs. ....   | \$421.28 |
| 150 lbs. shrinkage 98 cattle, 14,700 lbs., at \$5.36.....                 | 787.92   |
| 3 dead cows, av. wt. 1104 lbs., at \$4.85—\$160.63, less<br>\$10.50 ..... | 150.13   |
| Feed at Dickinson.....  | 58.80    |

|                       |                   |
|-----------------------|-------------------|
| Feed at St. Paul..... | 54.80             |
| Feed at Chicago.....  | 31.90             |
| <b>Total.....</b>     | <b>\$1,504.83</b> |

Will you kindly hurry investigation of the matter, and oblige,  
Yours very truly,

A. J. F.

**EXHIBIT "D."**

*Depositions of Wood and Labarthe.*

NORTHERN PACIFIC RAILWAY Co.,  
ST. PAUL, Jan. 31, 1912.

The following claims have been received from your:

132 Northern Pacific No. —. Your No. —.

R. J. WALL.

L. S. 4324.

Your letter Jan. 25 addressed to C. W. Perry in error.

Please keep a record of our claim number and refer to same if further correspondence is found necessary.

Yours truly,

J. F. HORRIGAN,  
*Freight Claim Agent.*

(Other side:) Wood Brothers, U. S. Yards, Chicago, Ill.

CHARLES HANSEN, a witness on the part of the plaintiff, was recalled for further examination:

**Direct examination.**

By Mr. AITKEN:

While I was on this trip with these cattle I kept a written record of the times that I loaded. I marked down every time when we left a feeding point—I marked down when we left Belgrade and every time we stopped to feed. I kept that record in my own handwriting as I went along. Plaintiff's Exhibit No. 8 is the record that I kept.

By Mr. HALL: Is this the writing you made at that time as you went along?

A. Yes, sir.

By Mr. HALL: What kind of a pen did you have?

133 A. I had a fountain pen.

By Mr. HALL: Is that the same sheet of paper you wrote on on the train?

A. Yes, sir.

By Mr. HALL: You had this particular piece of paper on the train?

A. Yes, I bought a tablet at Livingston a purpose—I didn't know we were going to have such a delay, but I marked it down anyway.

By Mr. HALL: You haven't transferred this from any other piece of paper?

A. No, sir.

By Mr. HALL: So when you got into Billings you put down the time you arrived there and then when you left you took up this same sheet and continued on?

A. I would write down the time I got there when I arrived—every feeding point.

By Mr. HALL: Did you do that when you got back home or at the time there.

A. I did that on the train when we stopped—we had lots of time to do that.

By Mr. AITKEN: Plaintiff offers plaintiff's Exhibit No. 8 in evidence.

By Mr. HALL: We object to that as—upon the ground that it shows upon its face that it is a memorandum that was all written at one time and upon the ground it is immaterial; the witness can use it as a memorandum to refresh his memory; we object to it  
134 upon the further ground that he has testified already as to the dates of arrival at the different division points, and the time he left and it is repetition.

By the COURT: I don't know as it is admissible after he has testified about these facts—he can use them to refresh his memory, but I never saw this question come up before. However, I am familiar with the rule; if you insist on it I will admit it at your request, and at your risk.

By Mr. AITKEN: I am perfectly willing to take the risk.

By the COURT: All right—it is admitted; give the defendants an exception; to which ruling of the Court the defendants duly excepted.

(Reads plaintiff's Exhibit No. 8 in evidence—attached to end of Transcript.)

#### Cross-examination.

By Mr. HALL: You understood me to state that one cow died at Fargo and one at Little Falls and one at Montgomery; three head died altogether.

Plaintiff rests.

By Mr. HALL: Comes now the defendants and moves the Court for a non-suit upon the following grounds: First, upon the ground that there is a fatal variance between the allegations of the complaint and the proof introduced by the—the evidence introduced by the plaintiff in that the complaint is an action in Tort based upon  
135 the common law liability of the carrier and the evidence shows that these cattle were shipped pursuant to a written contract which is admitted by plaintiff's reply and admitted in the evidence.

Second, Upon the second ground that the plaintiff's evidence totally fails to show that any of the delays occurring in this ship-

ment were caused by the negligence of the defendant company or the connecting carriers.

Third. Upon the further ground that no negligence as alleged in the complaint has been shown by the testimony here.

The COURT: Motion denied. To which ruling of the Court the defendant duly excepts.

*Defendant's Case.*

R. F. YOUNG, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination:

By Mr. HALL: My name is R. F. Young and I live at Helena. The position I occupy is that of Section Director in the United States Weather Bureau. I have held that position at Helena for about eight years. I have the weather bureau reports as published by the Department at Washington, D. C., for the month of January, 1912. Turning to the table showing the weather at Bozeman, Montana, on January 2, 1912, the highest temperature for the 2nd day of January, 1912, at that place was 13 and the lowest was 14 below. At Big Timber on that day the highest temperature 136 was 24 above and the lowest three below. At that place on the 3rd the highest was 25 above and the lowest two below. At Billings, on January 3rd, the highest was 12 above and the lowest was 26 below. At Billings on the 4th, the highest was 25 above and the lowest 15 below. The next station I have is Miles City, and on the 4th of January the highest was 18 above and the lowest was 17 below. On the 5th the highest was 10 above and the lowest 15 below. Fallon is somewhere between half way between Miles City and Glendive, and on the 4th the highest was 16 above and the lowest was 25 below. The highest on the 5th was 6 above and the lowest 24 below. At Glendive on the 4th the highest was 11 above and the lowest was 18 below.

Q. And the fifth?

A. The highest was 10 below and the lowest was 22 below.

By Mr. AITKEN: My record that you gave me has it 20 below—it is immaterial anyhow.

A. This is the original record here—that might have been a mistake.

Getting into Dakota, take it at Dickinson on the fifth, the highest was ten below and the lowest twenty six below. On the sixth, the highest was seventeen below and the lowest was 25 below. At Jamestown on the 7th the highest was five below and the lowest was twenty below. At Bismarck, on the 7th the highest was one below 137 and the lowest 29 below. At Moorehead—just across the river from Fargo, on the eighth the highest was two above and the lowest was twenty below. On the ninth the highest was twelve below and the lowest was twenty-three below. Montevideo is the nearest station to Staples that I have, and on the eighth the highest was six above and the lowest 13 below. On the ninth it was

eight below at the highest and twelve below at the lowest. In St. Paul on the tenth the highest was thirteen below and the lowest twenty three below. On the eleventh in St. Paul the highest was eighteen below and the lowest twenty-eight below. At La Crosse on the twelfth the highest was 14 below and the lowest was 34 below. At Dubuc on the twelfth the highest was six below and the lowest 26 below. At Dubuc on the thirteenth the highest was thirteen above and the lowest was eighteen below. On the 13th at Chicago, the highest was fourteen above and the lowest one below. On the fourteenth it was twenty one above, the highest, and the lowest four above. On the fifteenth the highest was nine above and the lowest two below.

Q. Just explain to the jury the manner in which these records are kept and sent to Washington for compilation of these results.

By Mr. AITKEN: We object to that; he can state how they are kept at his own station.

By Mr. HALL: The general proposition is what I want.

By the COURT: I think Mr. Aitken will admit it is the  
138 official record.

By Mr. AITKEN: Yes I will admit that; we will admit that they are accurate also.

#### Cross-examination:

By Mr. AITKEN: The highest temperature at Miles City was four below and the lowest fifteen below, on the second. At Glendive on the second the highest was five above and the lowest twenty five below. At Dickinson on the second the highest was four below and the lowest was twenty below. At Bismarck on the second the highest was five below and the lowest was twenty three below. At Jamestown the highest was five below and the lowest was twenty six below. I haven't any record of what the temperature was at Fargo. At Moorehead on the second, the highest was eight below and the lowest twenty nine below. At St. Paul the highest was nine below and the lowest twenty nine below. I have got the temperature at Chicago for that date. At Chicago on January second the highest was fifteen above and the lowest five above.

#### Redirect examination:

By Mr. HALL: As to whether or not there was any storm prevailing other than cold weather on the second, there was about an inch and one-half of snow at Bozeman—there was some snow over the State of Montana on the second—it was light in most cases.

By Mr. AITKEN: How was it over the Dakotas, Mr. Young?

139 A. There was a little snow at Bismarck and Dickinson.

Q. About how much?

A. Something like a half an inch.

Q. So there was no general storm prevailing anywhere along the line as far as the weather shows?

A. No sir, no snow storm.

By Mr. AITKEN: Just cold weather?

A. Yes sir, just cold weather.

I. P. DIEFENDERFER, a witness called and sworn on behalf of defendant, testified as follows:

Direct examination:

By Mr. HALL: My name is I. P. Diefenderfer, live at Belgrade, and have been living there since 1904. I hold the position of agent on the Northern Pacific Railway. I was agent there in January, 1912. I recall the shipment made by Mr. Wall, the plaintiff in this case, involved here. The cars for this shipment were ordered on the 30th of December for the second of January. The stock were brought in on January second, as near as I can remember, a little after noon. As to whether I know what they call the time freight or fast freight going east passed through that day, if I had to say from just memory I would say about nine thirty—the figures show nine fifty six—I looked on our train book and verified the figures at the

time the fast freight passed through there the stock had not  
140 arrived at the yards. The stock were loaded at three o'clock.

The engine from the west bound local—eighteen—No. 819 engine, loaded them. Train extra east picked them up after they were loaded. We call that just a common drag. As to the time of that train compared with freight train 602, it is just like comparing a stock train to a passenger train; in other words 602 runs about as much faster than the drag as a passenger train runs faster than 602. No. 602 has the right of way over the drag. The contract was signed there at that time. Referring to Defendant's Exhibit No. 1 on cross examination, that is the contract that was signed. That was signed right at the counter of the office. As to whether it was signed with reference to the time that the stock departed, I can't just recall that for this reason—very frequently we make up our stock contract before the stock is loaded so as we can get out bill and everything to have it ready, with the exception of putting the time that it is actually loaded on—other times we sign it after they come down—as a general rule after the stock is loaded they come down and sign it up and we deliver the contract. As a general rule that is after they finish loading, but there are some exceptions we make. There was no statement made by me to the plaintiff regarding the terms of this contract at the time he signed it. It was executed in duplicate. This is a carbon copy of the contract signed.

The original was given to the plaintiff. It carries the transportation. On the back of the contract is given the shipper's name and the parties that are entitled to the transportation to go with the stock. The names of Chris Hansen and Charles Hansen appear on the back of this, they were to accompany the stock. This is a contract for the stock under the conditions we took it—it also gives the transportation; he couldn't have it without he had that contract.

By Mr. AITKEN: Couldn't have the transportation is what you mean?

A. Yes, they won't pass him on the train unless he has a contract.

I can't remember of the plaintiff making any statements at the time he signed the contract. I simply handed him the contract and he signed it and took a copy and went out. He shipped cattle from that station every year since I have been there. All the contracts that I have had anything to do with have been the same as this one. If he had not signed this contract the rate would have been higher.

Q. Explain why it would be higher rate?

A. Well the tariff in effect at that time would have made it 100—

By Mr. AITKEN: We object to that on the ground that the tariff itself is the best evidence.

By Mr. HARTMAN: If the witness knows he can testify as to that.

142 By the COURT: See if he is familiar with the rate.

I had the rates on file and the published tariffs and naturally was familiar with them. If he would have declined to sign this contract when he got down to ship I would have explained to him that the tariff or rate would be such a per cent higher than by limiting his stock to the amount of the contract—and if it was suitable to him to do so he could sign it and if it wasn't suitable we could have let them go and given him the higher tariff. He would not have gotten the rate he did get if he had not signed this contract. The rate that was given him was a lower rate than he would have received if he had not signed this contract. I was there as an operator on November 30, 1909.

Q. Do you recall what if anything of importance occurred on that date in regard to the running of trains?

By Mr. AITKEN: I shall object until it is shown what that has to do with this case?

A. There was stock loaded there and then unloaded on account of the switchman strike of 1909.

I could not recall exactly the day the switchman's strike took place. As to who that stock belonged to, as near as I can remember Mr. Wall had a few cars—Mr. McDonald—The White Brothers—Scott and Charles White—No stock left Belgrade on November 30,

143 1909, that is the date that the strike went into effect—there was not because they were unloaded.

Q. We will show when the strike went into effect. As a matter of fact Mr. McDonald and Mr. Wall's cattle that were loaded on November 30, 1909, were afterwards unloaded were they not and they put in a claim to the railroad company for failing to take this stock from there at that time.

By Mr. AITKEN: That question is pretty leading—putting the words into the witness' mouth.

Q. I will withdraw the question.

It is pretty hard to tell how long after that the stock of Mr. Wall

and Mr. McDonald were shipped to Chicago. I would imagine a little over a month, if I can recall it. There has been shipments of stock pretty near every year since I have been at Belgrade. The number of stock that are put in a car ordinarily varies from eighteen to twenty-five head. If it is twenty five head I would judge that they would be small stock.

Q. Would you say it is possible to put twenty-five head of steers and cows that average from 1,350 to 1,425 pounds in a standard car?

By Mr. AITKEN: I object to the question unless it is first shown that he knows how big an animal of that kind is—he is a good agent and a good operator but I don't think he is a live stock expert.

A. My answer won't hurt you—I was going to say I  
144 couldn't really tell, because I wouldn't be expert enough in telling the weight of cattle to tell whether it was fourteen or—

By the COURT: I will overrule the objection anyhow.

I don't remember whether I met Mr. Chris Hanson on the morning of January second when they came to sign the contract.

Q. So if he came down there that morning it must have been somebody else than you he must have seen?

A. My opinion is that he had seen one of the operators because I don't go on duty until eight o'clock.

By Mr. AITKEN: I think that is right.

Q. Mr. Hansen said he was the agent.

By Mr. AITKEN: The agent that was acting there at that time.

I made no representations to Mr. Wall regarding the movement of this train—or the time I could get it to Chicago. There was no promise made of time whatever. I don't remember of anything being said as to the cold weather and the effect it would have upon the transportation of this stock.

#### Cross-examination.

By Mr. AITKEN:

I don't remember of seeing Mr. Hanson until he came in to sign the contract. I knew when the fast freight passed through there that morning by looking at our records. I looked at

my records some time ago when you spoke to me about it—I  
145 got out my car books. You did not ask me anything about

a fast freight, but I got my material together. You said you were going to ask me questions, and I was going to be ready to answer them. As near as I can remember the cattle got in after twelve o'clock, I should judge between one and twelve o'clock. I was at the depot, but I didn't see them come in. I know what time they came in because they came in and said they were in. When they came in and said they were in it was about one o'clock. I think we would have known if they got in before that, because we were watching for them and didn't see them come in. All I know about their

being in is when they came to the depot and told me they were in. They didn't tell me when they got in, but they weren't in when the time freight came through. That was nine fifty six in the morning. They were loaded at three o'clock in the afternoon. That is the time when the contract was signed—well the time the contract was signed was probably between that time and the time the train left which was three fifteen. I made this notation on the contract "Loaded at three P. M." when they came up and said they had finished loading. We allowed for the time that it took them to come from the stockyards to the depot, between the time they finished loading and the time they got there to sign the contract. I am not posted as to the tonnage that local train and 602 carried at that time of the year. I do not know what tonnage 602  
146 carried. I think the tonnage of 602 is lighter than the local.

It is different from the drag for the simple reason that the drag has nothing but dead freight such as lumber and empties and such stuff, that it doesn't make any material difference in the contents of the car if it is delayed. The drags are not through trains, they are made up of stuff that goes from one division to the other—that is one freight terminal to the other—very often switched out at different places. That drag would make just about as good time from Belgrade to Bozeman as any train up that grade. There wouldn't be much difference in the time. It is practically up hill all the way. This is a carbon copy of the contract that was signed at that time (indicating).

Q. Calling your attention to this exhibit—defendant's exhibit No. one on cross examination.

By Mr. HARTMAN: The witness has testified that was the original.

By Mr. AITKEN: No, he says that the original was given to the shipper—this is a carbon copy is it not?

A. That is a carbon copy, yes sir.

The original was given to the shipper.

Q. Calling your attention to defendant's exhibit number one on cross examination, especially to these words at the top of the contract—"Form 270 10-09—10 M. E."—do you know what those mean? Do you know what any part of them mean?

A. Form 270—that is the form of the contract—I would  
147 judge that the other is the tenth month and the ninth year.

I am not sure when that form was made—I would not care to answer that. I couldn't swear that that refers to the tenth month of the year 1909.

Q. What do you believe about it?

A. That is my belief.

By Mr. HALL: We will admit that is what it refer- to.

By Mr. AITKEN: That the date of this form is tenth month of 1909?

By Mr. HALL: We admit that those figures at the top of that contract "10-09"—no I will take that back—I thought you were referring to the figures here (indicating) I don't admit that—I

thought you were referring to something else; I will admit that form 270 revised 3-19-08 means that this contract or particular form of contract was written—re-written and revised on that date.

When Mr. Wall signed this contract I didn't tell him that he could get any different rate of freight if he refused to sign the contract.

By the COURT: Kindly avoid repetition as much as possible.

I don't remember of having offered Mr. Wall any information as to the rates at all. I cannot remember of telling him any different rates for different forms of contract or anything of that kind. I did not hear anything about the switchman's strike until November 30, 1909; it didn't take place until that date. I read 148 in the newspaper that there was trouble but then there was nothing to show that it was going to happen any more than any other strikes that were pending—I suppose we knew it was threatening. The stock wasn't accepted; it was loaded on the cars but it wasn't accepted. I can't tell you now whether it was moved from the yards or not, but they were loaded. It was only when they came down to sign the contract that the agent informed them we couldn't take them; they were informed at that time. They had some controversy about unloading them. The claim for damages which they filed was settled. As to whether I made any statement to Mr. Wall, or to any one for him, that these cattle would be put onto a regular stock train at Billings, I didn't make the statement outside of that I thought they would be—I told him that there was going to be loaded some sheep at Bridger the following day and if he was down there he would unload and then get in with them—if he was down to Billings, he would unload and then get in with them and would get a better run, but whatever happened, they didn't load. That is what I told Mr. Wall. It may have been a little different in the wording, but that is the effect of it.

#### Redirect examination.

By Mr. HALL:

It is always customary when we receive an order for a few number of cars to ascertain if there are other stock going to be loaded on that date or immediate date along the road, 149 especially on our division, and very frequently on the next division to us, for the purpose of consolidating them and giving them the benefit of the stock train runs. In the case the shipper does not sign the regular contract, we have another form of contract with we call the "Special contract." Defendant's exhibit No. three is a blank form of contract that shippers are required to sign where the valuation is different than that of the ordinary livestock contract. That is it (indicating).

By Mr. HALL: We offer in evidence defendant's exhibit No. three.

By Mr. AITKEN: May I ask him a few questions.

By Mr. HALL: Yes sir.

By Mr. AITKEN: In what respect does this contract differ from the other contract?

A. There is no values on there—you have to fill in your values.

By Mr. AITKEN: Is there any rate stated on here?

A. It doesn't give the rate on here, no.

By Mr. HARTMAN: That depends on the value filled in.

A. The rate depends on the value.

By Mr. AITKEN: Did you have this contract—do you have this contract regularly in the office down there—do you?

A. That is the contract—I give you a copy of the contract—it is revised like the others at different times.

By Mr. AITKEN: That isn't the same contract you gave to me—it would have saved me a whole lot of trouble if you had given me one of those. Do you have these contracts in stock in Belgrade?

A. Yes I gave you a copy of—that is the special contract—of course as I said they are revised at different times—practically the same thing though.

By Mr. AITKEN: This is the contract that you gave me is it not? (hands witness piece of paper).

A. That is the one I gave you.

By Mr. AITKEN: That isn't the same—that hasn't the rates on here at all—like that (indicating). It isn't the same.

By Mr. HALL: It practically—it is published on the back of the published tariff—in there it is written out in figures and here it is in letters.

By Mr. AITKEN: Why here they are written out—

By Mr. HALL: Yes, that refers to the entire published tariff and that refers to the rate of the published tariff.

By Mr. AITKEN: I have no objection.

By the COURT: Let it be admitted without objection.

#### Recross-examination.

By Mr. AITKEN:

It is customary when shipping livestock to ascertain if there were going to be any other stock shipments along the line so they might be added together—so they could consolidate along the line to make a stock shipment. We certainly did that in this case. We found out those were ordered at Bridger for the following day—of course—the following day he had to get to Billings and unload—that was the idea; he would go to Billings and unload and get his rest so that he would have the same chance getting out of Billings and wouldn't have to stop him off somewhere to wait. I got this information from the Chief Dispatcher's office in Livingston—the superintendent's office. It was on that information that I received from the superintendent's office on which I based my statement to Mr. Wall regarding the shipment of sheep.

## Redirect examination:

By Mr. HALL: I don't know whether these people did or did not decide to ship the sheep. All I know is that they had ordered cars for that day.

By Mr. AITKEN: You were not notified that they were not going to ship before that day?

A. No, sir.

M. J. SETTLE, a witness called and sworn on behalf of the defendant, testified as follows:

By Mr. HALL: My name is M. J. Settle. I live in Bozeman part of the time and part of the time in Meagher County, Martindale. I am in the sheep business now. I have always been engaged in the cattle business since I have been in the country up until a year ago this spring. I was in the cattle business thirty three years. During that time I have had occasion to ship cattle and accompany shipments of cattle from Montana to Chicago,—every fall since the Northern Pacific has been through except four falls that I didn't go down. It must have been thirty years ago that the Northern Pacific came through here. My shipments from year to year would average about two hundred. The class of cattle I shipped were generally steers and cows. I never loaded over twenty three steers in a car, and they would weigh between eleven and twelve hundred pounds when they got to Chicago. With a satisfactory and normal run the shrinkage would be about one hundred and ten or fifteen pounds, something like that. So if a steer weighed eleven hundred and fifty when he got to Chicago it would make him about twelve sixty or seventy five pound steer when he was loaded. As to how many steers, in my judgment as a cattle man, the majority of which had horns could be safely loaded in a standard stock car which would weigh fourteen to fourteen hundred and forty pounds when loaded. I should think nineteen or twenty head would be a pretty good load for a car of that weight. I should think it would be a hard job to get twenty-five steers of that weight in a car. The effect of the movement of them would 153 be that if one got down it would be hard for it to get up with that many of that weight in the car.

Q. Why would it be impossible do you think to get them up?

Mr. Mr. AITKEN: He didn't say it would be impossible to get them up.

As to why I think I couldn't get them up, there wouldn't be room enough for them to get up—the cattle would be standing—the cattle would be standing around here (indicating) so they couldn't get up. I have been breeding and raising Hereford cattle, different grades. We ship in September and October. These cattle, as a rule, are three year old passed, and occasionally a four year old passed—one that was missed the year before. As to the average weight of my stock, where they received an ordinary run, when they got to Chicago, I have had them weigh anywhere between eleven

and twelve hundred. I don't think I have had a shipment of steers where they averaged in excess of twelve hundred. They have averaged twelve hundred. It seems to me that the highest I have had them average was eleven hundred and sixty five pounds and I have had them still go lower than that. These were cases where the stock received ordinary runs and went through in good shape.

Cross-examination:

By Mr. AITKEN: The old Northern Pacific car was smaller than the cars are now. They were used to ship in years ago, but 154 when we shipped in those cars years ago we would ship about eighteen head in a car. I don't know just exactly the length of the old Northern Pacific car, but take these cars we have now, they are thirty six feet long. I don't remember the length of the other cars. These cattle that I refer to as having weighed 1,165 pounds in Chicago were grass fed cows, taken right off the range, and not fed at all. In my opinion the effect of taking an average three year old steers off the range in September and October and putting them on hay or alfalfa and feeding them from then until January would add considerable to their weight, I would think, and make them harder.

Redirect examination:

By Mr. HALL: As to whether it would make them harder to be fed on alfalfa than fattened on range grass, I don't know as it would make them any harder, but I think it would put more flesh on them. As to whether, in my opinion, the shrinkage would be more or less on alfalfa fattened steers or range fattened steers, if the grass was cured up in good shape in the fall of the year, I would think there would be more percentage on alfalfa than there would be on grass.

Q. Now one more question in direct examination—where stock are loaded—during what period of the time—during which 24 hours of the transportation from the point you started in Montana does the greatest shrinkage occur?

A. I think they claim on the first run.

155 Q. The first twenty four hours?

A. The first twenty four hours, yes, sir.

Q. About what percentage—assuming that an animal—the normal shrinkage of 100 pounds in ordinary run to Chicago—about what percentage of that would you say they shrunk the first twenty four hours?

A. I don't know as I could tell.

As a rule when loaded their paunches are full, and the effect the first twenty-four hours would have on the paunch would be to drain it pretty near. As a result of that I couldn't tell how many pounds an ordinary steer would shrink in the first twenty-four hours; that is hard to tell. I don't think it would shrink half of the 100 pounds. I wouldn't want to make any estimate as to what proportion it would shrink. I do say that I think it would be more the first twenty-four hours of the run.

## Recross-examination by Mr. AITKEN:

I have never shipped any alfalfa fed stock, so I have had no experience with alfalfa fed stock on which to base any testimony which I may give here. As to how far on an average I would have to drive this range stock when I was shipping to get them to a shipping point, we have driven them fifty miles and some we have driven thirty miles. They shouldn't shrink much on the drive.

They shrink very little, but not enough to speak of hardly.  
156 We have never been bothered much about the feed not being good on the drive. We have always had good feed on our drives that we have ever shipped. We used to drive from lower Lake Basin into Billings and we used to drive to Merrill and then we used to drive to Big Timber—we have drove to Big Timber when they didn't have much feed on the road but we always managed to get to a good field at night and had feed hay. In order to prevent shrinking when feed on the trail was poor I hired a fenced inclosure and feed them hay. I never drove to Huntley.

## Redireet examination by Mr. HALL:

In driving stock to a station, where I take them across country, as from Lake Basin and Billings, we used to drive them about ten miles a day—sometimes wouldn't make that distance on account of the weather.

THEODORE KARTES, a witness called and sworn on behalf of the defendant, testified as follows:

## Direct examination by Mr. HALL:

My name is Theodore Kartes. I live at Bozeman and am agent at that place for the Northern Pacific. I have been agent there one year, since February 21st. I have been railroading fifteen years. I have the published tariffs of the Northern Pacific as approved by the Interstate Commerce Commission. I have the supplement to this tariff as published and approved in force at the time of  
157 the shipment of the stock in question in this suit was made.

Q. I wish you would turn to that and first tell me what the rate of stock from Belgrade to Chicago was under the regular livestock contracts?

A. Supplement No. nine to tariff 580-A, issued December 12, 1911, is quoted at 63.5 cents from Chicago to Bozeman, sixty-three and one-half cents per hundred. This supplement has in it notes or schedule explaining the tariff on livestock. We call it item 12-A. It reads: "Maximum valuation. Item No. 12-A spds. 12—Rates named herein are based upon value declared by shippers"—that refers to the rate of sixty-three and one-half cents—"not exceeding the following under contract: Each horse or pony (gelding, mare or stallion), mule or jack, \$100. Each colt (under one year) \$50. Each ox, bull or steer, \$50. Each cow \$30, each calf \$10. Each hog \$10. Each sheep or goat \$3.00. When declared value exceeds the above an addition of ten per cent will be made to the rate per 100 lbs. or car for each 100 per cent or fraction thereof, of addi-

tional declared value per head. When the declared value of animals exceeds \$800 per head, or when no value is given, an addition of 100 per cent will be made to the rate per 100 lbs. or car, named herein. On mixed carload shipments, when the declared value of animals is different, the rate will be based upon the highest value declared for any one animal in the car." That is all under the maximum valuation.

158 By Mr. HALL: We offered in evidence a little while ago Defendant's Exhibit No. 3—I will ask you to refer to that and state whether that is the special live stock contract that was in force at the time this shipment was made.

A. I couldn't tell you whether it was in force—just at minute—

By Mr. AITKEN: That testimony is tending to impeach one of their own witnesses—contradict one of their own witnesses.

By Mr. HALL: It is not for the purpose of impeaching our own witness—

A. (Interrupting.) That wasn't in effect at the time the shipment was made.

As to whether I have the special livestock contract that was in effect at that time, I have a livestock contract, but not termed as a special—it is another form of livestock contract. It is used when the declared valuation is given or the valuation is—the valuation on the stock is given by the shipper and was stated on the contract—he uses his own price as to the value per head of the stock. This form that I just referred to is the form that is now in force and was in force in January, 1912.

Q. We would like to withdraw that other form that was not in force at that time.

159 By the COURT: I don't think it is necessary to have either one of them in there under Mr. Kartes' testimony.

By Mr. HALL: It is hardly necessary.

By Mr. AITKEN: I have no objection.

By Mr. HALL: Let the record show that we withdrew defendant's Exhibit No. three and now offer in evidence in lieu thereof, Defendant's Exhibit No. four.

#### Cross-examination by Mr. AITKEN:

The tariff that I read from is not in effect at the present time. It was in effect at that time, but it is not in effect at the present time.

By Mr. HALL: I notice at the top of that published tariff the initials I. C. C. No. 4104, do you know what that has reference to?

A. Interstate Commerce Commission number—the tariff is not good without their authority being quoted on the face of it.

It is not customary with me when the shipper refuses to sign the standard form of livestock contract to wire the general freight office for advice. I have known of people refusing to sign the ordinary form of contract—form 270—I think it has happened four times since I have been with the Northern Pacific that people have applied for the other form—that was when they were shipping bulls

and fancy stock. I have been with the Northern Pacific eight years, since 1905. The Northern Pacific does some advertising. We advertise to carry dead freight from St. Paul to Bozeman in 160 96 hours, and we do that right along. Live stock is considered a great deal more perishable than dead freight in certain ways. Our regular schedule from St. Paul to Bozeman in ninety-six hours—ninety-six hours is what we stipulate in the advertisement. Of course we have some delays, but we do it all right to beat competition.

Redirect examination by Mr. HALL:

In making this time we do not stop to feed and water, just stop to change engines.

By Mr. AITKEN: You stop for coal and water don't you?

A. Yes, a few times between St. Paul and Bozeman.

SYMON MEADOR, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HALL:

I reside at Helena, Montana, and I am in the train service of the Northern Pacific. At the present time I am yardmaster at East Helena. I have been in the employ of the Northern Pacific four years—it will be five years the second of July. I have occupied other positions than that of yardmaster. I have been brakeman and conductor. I was a conductor on the Northern Pacific in January, 1912. I recall the occasion of the shipment of some livestock by Mr. Wall—four cars of stock from Belgrade on January 2,

1912. I handled that shipment of stock from Belgrade to 161 Livingston, as conductor in charge of the train. I took the stock on at Belgrade. It was quite a while ago and I couldn't remember just exactly the minutes or hours or anything but the train sheet shows at three fifteen when I left Belgrade. By train sheet, I mean the record of our movements station by station over the entire division, made at the times the movements were made. Refreshing my recollection from the train sheet, I suppose I picked the cars up at Belgrade at three o'clock and left Belgrade at three fifteen. I had what they call a drag or dead freight—dead freight—lumber and shingles and so forth. Into Belgrade I had twenty-five cars and out I had twenty-nine. The four cars of stock made the additional cars so as to make up the twenty-nine. I arrived at Bozeman at three fifty-five P. M. I got that time from the train sheet and from my register—in and out—at Bozeman. When I came to Bozeman I registered in the hour and the minutes I arrived. Coming into Bozeman the stock cars were the four rear cars. The caboose was on behind the stock cars. I was at Bozeman according to my records thirty-five minutes—the train sheet shows me a few minutes more. Twenty-five minutes of the time I was in Bozeman I was waiting for No. 4 to pass, and ten minutes switching the stock into the train so that they would be away from the engine on ac-

count of the hay that was in the cars that were likely to catch fire.

162 By Mr. HALL: Have you got your reports here.

A. They are here some where—I saw it in your files or Mr. Weston's or somebody's. My delay report is what you want.

By Mr. AITKEN: I want to see it.

I was delayed twenty-five minutes at Bozeman waiting for No. 4, which is a passenger train going east. At that time passenger trains had the right of way over the sort of train I was pulling.

Q. Even if there were four cars of stock there?

A. Yes, sir.

By Mr. AITKEN: Don't lead the witness quite so much.

I had no trouble whatever, nor was there any complaint made at Bozeman, by the people in charge of this stock, as to any of the cattle breaking through the car or the car being out of order. I left Bozeman from three fifty-five and thirty-five minutes would be about four thirty—that is the best I can remember—the train sheet will show precisely. After remaining here thirty-five minutes I left Bozeman for Livingston. As to whether there was any complaint at any time made to me about the car being out of order, and the cattle having got their legs out or anything of that kind there was not, but I will tell you—when we got through the tunnel ready to go down the hill at Livingston—we always watch our train

and see that everything is all right and in looking it over  
163 we found a steer—I wouldn't say it was a steer but some

kind of a critter in the car, but whether a cow or steer or bull I don't know—had shoved one of his feet out from under the door: we held the train long enough to prop the door out—we called attention to the cattle men that were with us and we went out and helped the critter to get back in—sprung the door out and got her in again. I show a delay of ten minutes at Muir cutting out helper, but I don't say anything about the delay in getting the critter back in the car. This was a small matter to pry out the door in this manner so we could get it back in. They asked if the car could be repaired at Livingston and I said it could. When we got to Livingston I notified the proper people upon leaving my reports and suppose they repaired it—I didn't go down in the yards to see because I was relieved of duty there, and another conductor took charge. On that trip from Belgrade into Livingston the weather was pretty cold and the wind was blowing right smartly. I got into Livingston at eight P. M. As to what effect the weather had in impeding the movement of the train, generally if the train stood around a while it would have a tendency to freeze the oil in the car and until the train got warmed up it wouldn't go as fast until the train went a few miles and started to lubricate again.

Cross-examination by Mr. AITKEN:

164 The oil freezes. I have seen the oil and the dope together—there is waste put—oily waste put in around the journal to furnish lubrication to run the car—in stormy

cold weather this dope and oil will freeze so hard that the wheel will actually slide before it will turn. The train sheets always show the actual facts as to the arrival and departure of trains just as it happened and is reported by the operators under the different stations entered at the time the movement was made. I don't believe it is a fact that frequently trains are reported out earlier or later than they actually move. If false reports were made like that I don't know anything about it. I have never known of it being done, and I don't know of any reason why any false reports like that should be made when the truth would fit just as well. As to what was my usual running time from Belgrade to Livingston, I am not a carded train—whenever we got there. As to when we usually made it depended on the meets we had and the condition of the weather and the snow and so forth and cold weather. The stock were not ready for me to pick up when I got to Belgrade. They were in process of loading. I was at Belgrade thirty minutes, I believe, is the delay I show there.

Q. The delay you show here is twenty-five minutes?

A. Well, that is pretty close.

I picked them up as soon as they were loaded. I suppose it was about fifteen minutes after I got there before they were loaded, something near that. I did not send an engine up and put them on the rear of the train. I cut off the caboose below the switch and the local engine shoved them off of the switch and I backed right up onto them. I had a few other delays on the road; I had a delay of something like thirty-five minutes at the West End, the train sheet will show, and I was delayed at Muir again for ten minutes. I have to cut out the helper at Muir, and it was for cutting out the helper that I show the ten minutes' delay there, but in the meantime we were fixing this car. I don't show anything like that in the report.

Redirect examination by Mr. HALL:

The delay of thirty-five minutes was at the West End of the tunnel between here and Livingston. Muir is on the east end of the tunnel and the west end on the west end of the tunnel.

I. L. URIE, a witness called and sworn on behalf of the Defendant, testified as follows:

Direct examination by Mr. HALL:

My name is I. L. Uriel, and I reside at Livingston. My business is yardmaster in the employ of the Northern Pacific railway. I have been in the employ of that company about ten years, a little better than ten years. I occupied the position of yardmaster with the Northern Pacific on the second of January, 1912, and I recall the occasion of the four cars of cattle shipped by Mr. Wall 166 coming into Livingston on the evening of January 2, 1912.

I had something to do with the handling of those cars while in Livingston. I know when the cars came in there. It was eight P. M. in the evening. They remained there three hours and fifteen

minutes, so that the train went out at eleven fifteen. The occasion for the delay at Livingston for that three hours and fifteen minutes that evening was we were making up the train until ten o'clock. We added some other cars to it and switched this stock out that was up in the train and put them up on the rear end—after that there was a time freight due that was late and that delayed them some. That was 651, west bound time freight. I call that a time freight as distinguished from this train that came in with the cattle, the difference is that it handles time freight stuff and this train that had the cattle was dead freight. The time freight has the right of way. It is a scheduled train. The time freight arrived there at ten fifty-five, and came from the east, so this freight couldn't get out until after the time freight had gotten in.

By Mr. AITKEN: We object to the question because it is leading.

By Mr. HALL: I think it is.

By Mr. AITKEN: Most of them are leading.

Q. What is the fact as to whether or not the train that came in at eight o'clock with these cattle could not leave until after the time freight came in—

167 A. Well—I don't just understand you I think—

By the COURT: The witness has answered that—there was a motion to strike the evidence out—that has all been answered.

After the time freight came in the other train didn't go out for twenty minutes. I can't tell just what was the reason for that delay—I was busy with this time freight train—I think they had some trouble with their air then. They had to adjust the air—they had to test the air; they have to make a complete air test before leaving; and the weather was a little cold and in making up this train we make—we made it up from the west end; and we probably had that train all in there together and when they started it would stretch that hose and probably make some leaks; I couldn't say for sure but it must have been something of that kind because everything else was ready. As to what I have to say as to the likelihood of these leaks in the air occurring in such weather as I had at that time, we have quite a little trouble with that air hose, the hose gets stiff and when it is stretched out it opens up. The cold weather makes the hose get stiff.

Cross-examination:

By Mr. AITKEN: It is pretty hard to say how many trains I handle in the course of a year. I should judge that either the day or night shift would average six or seven trains on one shift; 168 that would be along about fifteen trains a day. The reason that I can remember so well about this train is because we have a record of it. I am testifying from the records, that is about the only way you could testify from. I remember of being notified about that stock door. I notified the car man to repair it and also saw them after it was repaired, to find out if it was repaired. It was ready to go at ten o'clock; just got it made up then.

We didn't get it made up before. It actually went at eleven fifteen. That was within an hour and fifteen minutes after it was ready to do. I don't know where this time freight was delayed.

Q. It must have been quite a ways down towards Big Timber to have been that late?

A. No you see it wouldn't—it would have to have some time to get out in between places—the one coming in and the one going out it would take time—considerable time to get to the next station without delaying the other train.

It is six miles to the next station.

Q. But one hour and fifteen minutes elapsed between the time this train was ready to leave and the time this train came in?

A. This train was ready to leave at ten fifteen and the other train arrived at ten fifty-five.

That is thirty-five minutes. The time freight has the right of way over live stock.

Redirect examination:

By Mr. HALL: I said there was a bad order stock car  
169 that was taken care of that evening. It was one of the stock cars in which this shipment of stock was being made. That car was repaired and put in condition before the train would be ready to get out. I don't know exactly how long it took to repair that car, but I notified the car foreman and he went and got the lumber and fixed the door—I also seen him afterwards and he said it was all ready; that the car had been repaired. I was asked about the length of time that this train was held to let the time freight come in.

Q. And you were asked the distance from Livingston to the next stop where they could have met; can you explain why it didn't run onto the next stop? The next six miles.

A. Well, they didn't have the time.

Q. Wouldn't have the time?

A. No, sir.

Q. What is the rule about the clearance of trains?

A. That is where trains meeting—of course time freight trains; it was a time freight train and it was shown on the time card; this other train was an extra train.

Q. That is the train that came in with stock was an extra train?

A. Yes.

E. W. WESTON, a witness called and sworn on behalf of the defendant, testified as follows:

170 Direct examination:

By Mr. HALL: By name is E. W. Weston. I live in Livingston. I am Chief Train Dispatcher, and have been in that position about seven years. I have been in Livingston a little over ten years. The particular duties of the Chief Dispatcher is to supervise the movement of all trains and the handling of equipment—keep it moving—moving the traffic. It is not part of my duties to arrange the meets.

I have assistants that do that, but I supervise that. That is under the Chief Dispatcher's jurisdiction. Part of the duties of the assistants is to make records showing the arrival and departure of all trains. That record shows the actual time they arrived and departed at each station, and the actual time they passed that station if they made no stop. The time that the train is reported to get there is not reported by me, but the time that the train actually gets there and actually starts to move is reported by me. The effect that extreme cold weather has upon a train is to retard it very materially—makes a very slow movement. Take the weather from ten above to zero and below and it makes a very decided difference in the movement. And in nearly every case where it goes to zero and below the tonnage is reduced—fewer cars hauled, trusting to overcome that. It has the same result on passenger trains; it causes more delay at every stop; take any train when it stops, it is harder to get started; there are more things that will come up to cause a delay to a train in cold weather. The Yellowstone division train sheet shows the movement of train 602 out of Billings. It does not show when the stock were loaded. The power was ordered for it at 3:45 A. M. They were delayed there fifty minutes picking up cars—both ends of the train; fortyfive minutes blocked by C. B. & Q. extra. That is a train that operates over a part of the track there. They were also delayed by No. 2 that morning. When they were ready to go after the C. B. & Q. was clear, this North Coast Limited was due and they hadn't time to go ahead of them. They hadn't time to make the first siding. The purpose of this train sheet is to always have a permanent record of the movement of all trains over the railroad. The dispatcher gets his information to make up this record from the telegraph operators at each station telegraphing or telephoning the information to the train dispatcher on duty. He usually telephones or telegraphs immediately after the departure of the train unless the train is at the station for some little time, then he will give the arrival time when it arrives and then give the departure time afterwards.

By the COURT: Are you questioning the accuracy of these reports.

By Mr. AITKEN: No.

By the COURT: Let them be admitted then.

By Mr. AITKEN: I don't admit that they are true, but I won't raise the question.

172 It is quite necessary for these records to be accurate and it is necessary to have it for the safety of not only property, but lives of people—that is what the train dispatcher depends on to make his meeting points and for the movement of trains—that is his record; if they are not correct, if no accident happens from it, there would be serious delays; that is one reason why it is necessary to be accurate to avoid delays; if delays occur the train dispatcher is responsible and they take him to task for it. The train sheet out of Dickinson on January 6th does not show when the stock was loaded, but does show the time of departure, which was 11:35 P. M. The train sheet shows delays that might have been occasioned by the meeting of other trains. Passenger train No. 7 arrived there at

10:38 P. M.; local train No. 797 arrived there at 11:35 P. M.; there is an extra train going east in the same direction which caused a delay to No. 797 which in turn delayed this train east; that combination of these three trains caused the delay. The train sheet from Staples to Little Falls shows that there was a delay of some time at Crandall on the morning of the tenth—a combination of delays there caused by trains one, six, eight, fourteen and 603. It appears that No. 1 was delayed there close to an hour and twenty-five minutes. This train arrived at Crandall at 5:25 and didn't have quite time enough to get to the next station to meet No. 1—had to stay there about twenty-five minutes or thirty minutes; when that 173 time was up No. 1 was delayed about an hour more, making a total of one hour and twenty-five minutes. There was no stock taken out of Belgrade on November 30, 1909. The switchmen's strike took place on November 30.

Q. Do you know what is the customary number of steers that are shipped in a standard stock car?

A. From 18 to 22 and 23.

By Mr. AITKEN: If the court please I never made any point on this question before; there is no evidence to show that we shipped twenty-three steers in this car—23 steers in any one car.

Q. You have some cows in here to—1350 # cows here.

By Mr. AITKEN: There are lots of them.

By the COURT: Let them put in for what it is worth—for what the whole thing is worth.

These delays that I have been testifying to as occurring at different points, from my examination of these train sheets, I can't find any that were unreasonable. They are what you can expect in ordinary railway service under similar circumstances. The only serious time lost was at Crandall to No. 1—that was something happened to No. 1 that was unusual which delayed here. No. 1 ran into some bad track unexpectedly or what we call dynamiting the wheels—dynamiting the train, sliding several pair of wheels. Dynamiting means throwing the air onto the extreme limit to stop as quickly as possible; that of course slides the wheels and flattens them 174 or a broken draw bar, possibly two or more—possibly had to chain them up; that is what caused the delay to No. 1—that in connection with the severe cold weather made the delay very serious; the other delays was nothing more than you could expect under the weather conditions at that time. The various delays that have been testified to here in the handling of freight in that kind of weather are not unusual delays.

#### Cross-examination.

By Mr. AITKEN: As to my statement that No. 1 ran onto a piece of bad track, I desire to explain that. The bad track that No. 1 ran onto at that time didn't occur on the Montana division and I don't know of personal knowledge, but by reports that were made later—that was the cause; they ran onto some rough track or something

that wasn't just right and the engineer thought it was necessary to stop quickly. He stopped quickly by putting on the air, by dynamiting the train, as we call it, and the wheels slid under the train. This happened just east of Crandall, somewhere between Crandall and Darling. They found a piece of bad track—that is my understanding—that is the reason they put the brakes on. As a railroad man I would say that the dynamiting of the train was what the engineer should have done. The passenger trains were running late at that time, anywhere from thirty minutes to several

hours. I got my knowledge as to the number of stock which  
175 should be loaded in a car from experience as station agent in years past and by mixing with stockmen and in conversation with them—it is not a personal knowledge of loading stock that I have. You might call what I know about it hearsay—it is from my observation of freight bills of what they put in cars and the weight of stock; when you come to compute the weight of 18 or 25 head of stock that are 1,400 pounds and the size of those cars and you will find that you can't get very many in. I am not posted on whether apparently small cattle or certain breeds will weigh more than a great big, apparently larger animal. I have based my testimony on knowledge that has come to me in years of experience—that is what is loaded from time to time. I don't know as a matter of fact that small breeds of cattle weigh more sometimes than much larger breeds. I am not posted on the breeds of cattle. As a matter of fact I don't know much about the weight of cattle.

Q. You say in Darling that the train sheet shows that No. 1 was twenty-five minutes late?

A. No—I don't know how late they were.

Q. You say they were delayed twenty-five minutes—or at Crandall rather—

A. I said freight train that went into Crandall had possibly 25 or 30 minutes, but not enough time to get to the next station.

The next station was Darling. I think it was—they hadn't  
176 time to get to the next station for No. 1—and they stopped at Crandall. I don't know how much time they had. The train sheet shows the time they arrived and the time No. 1 arrived. The train sheet will show whether No. 1 was running on schedule time or not.

Q. I wish you would look at your train sheet?

A. I would like to ask Mr. Maher for a copy of that consolidated time card if he has got one.

Q. Here is a folder of June, 1912.

By Mr. HALL: Will you have this or that (indicating).

A. I will use this for a minute. The nearest point is St. Cloud, where any time is shown on this folder and it shows that No. 1 was three hours and 42 minutes late out of St. Cloud.

I haven't got the train sheet here that would tell me whether No. 1 arrived at Livingston on schedule time. We have the train sheets for the time of the starting of this shipment, January second. I have the train sheets of the Yellowstone Division for January 6th, between Billings and Glendive, and for the same date between Glen-

dive and Mandan for No. 1 on the 6th—No. 1 arrived at Glendive at 4:02 P. M.

By Mr. HALL: What time is it due there?

A. Due at 4:30 A. M. according to this.

No. 3 was annulled on the 6th. Evidently over 12 or 14 hours late. No. 5 arrived at 6:08 A. M. That would make it not quite three hours late. No. 2 arrived at Glendive at 2:05 P. M. That would make it two hours and forty minutes late. No. 4 was

177 forty minutes late. No. 6 was about forty minutes late.

All of these is at Glendive. Bear in mind that this is not an official time table.

By Mr. HARTMAN: When did that go into effect.

By Mr. AITKEN: June, 1912.

That is the only one they give to the public.

By Mr. HALL: This is month after this.

By Mr. AITKEN: Yes, sir.

By Mr. HALL: Time tables change every thirty days.

By the COURT: There has been no substantial change in trains Nos. 3, 4, 5 and 6 in the last few years.

A. There is a change of about an hour in some of them.

By the COURT: Even numbered trains are eastbound trains and odd numbered trains are westbound trains, are they not?

A. Yes, sir.

#### Redirect examination:

By Mr. HALL: I have the train sheet here for the 10th—for the Staples division—I mean for the St. Paul division—Staples to St Paul. This is the ninth.

Q. State how the time of numbers 2, 4, and 6 compare—state how the time of the arrival of these trains of these dates compare with their schedule?

A. At what point?

178 Q. At St. Paul, 2, 4 and 6.

By Mr. AITKEN: Does that show their arrival at St. Paul?

By Mr. HALL: Yes, sir; No. 6 was four hours and twenty minutes late; No. 4 was annulled; they show on the train sheet the next day—probably 10 or 12 or 14 hours late.

They annul a train because when they get several hours late it makes it inconvenient to carry them through on regular schedule. If twelve hours late they can't be run on through under schedule and they have to annul them; sometimes if 10 hours late they don't like to carry them on their schedules—

Q. (Interrupting.) How about No. 2.

A. That was wrong about No. 6—that was number—just correct that—No. 6—make it seven hours and eight minutes late; and No. 2 was thirteen hours and fifty-nine minutes late.

Q. These trains—2, 4 and 6, that you had just testified about were the trains—the eastbound trains—that is coming from the west that

arrived in St. Paul—due to arrive on the ninth—the even-numbered trains?

A. They arrived at their—

Q. (Interrupting). I don't care just what hour—

A. I will see whether they arrived before midnight—No. 2 arrived there the ninth—No. 6 arrived early the morning of the 10th—that is right after midnight.

179 Recross-examination:

By Mr. AITKEN: I think I can tell you how Nos. 1, 3 and 5 were running on January 2nd into Livingston and what time they arrived there. No. 1 arrived at 9:06 P. M.; No. 3 at 12:18 P. M. and No. 5 at 4:30 P. M. As to when these trains were due, according to this time table, No. 1 was due at 2:15 P. M., No. 3 at 1:53 A. M. and No. 5 at 3:25 P. M. That would make No. 1 on the 2nd at Livingston six hours and fifty-one minutes late. No. 3 was seven hours and twenty minutes and No. 5 was fifty-five minutes. That was the date these stock were shipped from Belgrade. In order to overcome the effects of the cold weather it is customary to reduce the tonnage of freight trains. That does not enable them to overcome the effects of cold weather largely, but it does to a certain extent. The tonnage of this particular freight train out of Livingston was 1,940 tons. The ordinary tonnage is 25, 26, 27 and 2800 tons out of Livingston, eastbound. I think the tonnage out of Billings was 1816 tons. I believe the tonnage out of Billings is somewhere around the two thousand. The grade is all down hill from Livingston to Billings.

Q. So the tonnage of the train is only limited by the number of cars you could put on it?

A. It depends on the weather; very cold weather it makes a difference; in bad weather—in severely cold weather a train goes on a siding and if it is there for any length of time it is hard 180 to start it, even if it is down grade a little; some of the sidings are hard to pull out of.

That is the practice in cold weather to reduce the tonnage so as to overcome the effect of cold weather.

E. D. WILSON, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination:

By Mr. HARTMAN: I reside at Tacoma, Washington. In the early part of January, 1912, I was residing in Dickinson, North Dakota. At that time I was yardmaster for the Northern Pacific Railroad. I have been engaged in that business 17 years. I remember the occasion of four cars of stock coming into Dickinson arriving at 2:30 P. M. on the 5th of January, 1912, shipped from Belgrade. The stock remained in Dickinson—the stock remained in Dickinson from 2:30 P. M. on the 5th until 11:30 P. M. on the 6th. They were unloaded in forty-five minutes after they arrived at Dickinson. They started unloading at 3:15 and finished unloading

somewheres about 3.40 or 45. The stock were loaded up again at 10 P. M. on the 6th. They fed and watered and rested there. As to who furnished the hay, the company has no regular feeding point at Dickinson, and whenever stock is to be fed at Dickinson we always call up the—call up some livery stable and get them to come to the stock yard and see how much these parties wish per 181 car; some people order three bales per car and some four bales per car—that is up to the man that has charge of the stock. That was the rule pursued upon this occasion. The owners of the stock made no complaint whatever as to the condition of the stock at this time. The stock were loaded at 10 o'clock P. M. and they were pulled out an hour and 10 or 15 minutes later. The cause of the delay was in meeting delayed trains that had preference over them—the right of track over them—No. 7. No. 7 was the delayed train that had preference of track over them. They pulled out as soon as this train that had preference pulled in. There was no delay about unloading. In the course of my business I have had occasion to observe the loads of cattle that were hauled—the number of cattle put into a car and all that sort of thing. As to the method of loading cattle and the number of cattle that go into cars for shipping purposes, the method is with the stock men—that bring in their stock to Dickinson to load—they will cull them over and pick out the best cattle for one car—13 and 14 hundred pound cattle—he will get his heaviest cattle in one car. They couldn't possibly get more than 19 or 20 cattle weighing 1,400 pounds, at the outside.

Q. From your observations then what would you say as to whether or not it was good loading to mix the sizes of the cattle—have large and small ones loaded in the same car?

A. I would judge from what stock I have seen loaded in 182 the twenty-two years' experience of railreading, it is poor policy to mix the grades.

Q. Suppose you have a car loaded with 25 cattle what would you say as to the weight of cattle which you could put 25 of them in a car?

By Mr. AITKEN: Unless the witness is qualified as an expert it is hardly a proper question; you haven't qualified him—haven't shown he has ever weighed cattle:

By Mr. HARTMAN: The only experting I am showing is his observation and from handling cattle—loading them into cars—loading them in and out during his 25 years' experience.

By the COURT: I will let it be considered for what it is worth. To which ruling of the Court the plaintiff duly excepts.

A. The first consideration the company would not accept that number of cattle of that weight in the car; the weight of the car is based on a maximum weight—you take the minimum average of cars of Northern Pacific stock cars is 40,000 pounds and you put 25 head of 1300 or 1400-pound cattle in there and it would bring it between 49 and 50 hundred pounds, which would bring it over 10 per cent, which the Interstate Commerce allows for the overloading.

## Cross-examination.

By Mr. AITKEN:

Q. You say that 25 head of 1400-pound cattle would bring it to 45,000 or 50,000 pounds?

183 A. Yes, won't it.

Q. Didn't you say that?

A. Yes, I believe I said that.

Q. Can you do multiplication.

A. Yes, I can if you get me a pencil.

Q. All right, take this—multiply 1400 by 25.

A. 35,000 pounds.

Q. So that wouldn't weigh 45,000 or 50,000 pounds?

A. No, that was just a rough estimate.

Q. That would be under the minimum car load?

A. Under the minimum.

By Mr. HARTMAN: Under the maximum.

Q. 30,000 is the minimum.

A. 40,000—no the minimum is 24,000 on cattle.

Q. So they figure as much as 40,000 pounds of cattle can be loaded in a car?

A. 44,000—they can load 10 per cent over.

So far as the company is concerned you could load 25, 1400-pound cattle and have 9,000 pounds left over, but you would have to pay on the 24,000 basis.

A. J. STEINBRUCK, a witness called and sworn on the part of the defendant, testified as follows:

## Direct examination:

By Mr. HARTMAN: My name is A. J. Steinbruck. I reside at Dickinson, North Dakota. I am freight conductor on the 184 Northern Pacific Railway. I have been freight conductor since 1903. I was freight conductor in the early part of January, 1912. As to whether I remember handling four cars of stock shipped from Belgrade, Montana, on the 6th, 7th, 8th or 9th of January, I remember the two brothers in connection with that trip, and I remember handling four cars of cattle from Belgrade, Montana. Before stating what I did in connection with the handling of those four cars of cattle I will have to refer to my records.

Q. All right—just state what you did about handling the cars and what you recall about it.

A. I was in charge of an eastbound freight train called 602 which contained four cars of cattle billed from Belgrade, Montana, to Minnesota Transfer—leaving Dickinson 11:30 P. M. January 6th, 1912, and arrived at Mandan at 8:45 A. M. January 7th, 1912.

By Mr. AITKEN: That is from one division to the other.

A. Yes, sir; from Dickinson to Mandan—Yellowstone Division.

By Mr. AITKEN: 110 miles.

A. Yes, sir.

I will give you the delays that occurred in rotation from my delay report: Dickinson, delayed there one hour and thirty minutes meeting No. 7 first class passenger train and 797 local freight;

Gladstone, delayed five minutes waiting for orders; Richer-  
185 ton, twenty minutes on account of air hose leaking.

Q. What do you mean by that—explain that—what caused it?

A. The air hose connection between the cars spreading and the air escaping from the train might cause the brakes to apply automatically and stop the train.

Severe cold weather would cause that sort of trouble to happen, say, zero or below, anything below that. My records show we had cold weather—what the actual temperature was I don't know. We were delayed at Hebron thirty minutes meeting first part of No. 5. That is a first class passenger train. And there is an additional ten minutes at the same station on account of air hose leaking. That was the same trouble I had at the last station. Eagle's Nest is the next station; twenty-five minutes to meet Second No. 5, which is also a first class passenger train. Glenollen, fifteen minutes taking coal and water; Kurtz, ten minutes meeting No. 603, a second class freight. According to the time table, No. 602, being east-bound, has preference over the same class of train that is west-bound; it would in this instance and according to the time table have preference over 603. That was possibly a meet that was made by the train dispatcher through the medium of train orders. New Salem, fifteen minutes delay there in meeting—letting No.

6 past; No. 6 is eastbound first class passenger train. Sedalia,  
186 thirty minutes' delay meeting No. 1—a westbound first class

passenger train, and an additional delay of twenty minutes on account of break in two. It shows on this delay report a delay of fifty minutes, at Sweet Briar, on account of a hot box; this was all of the delays. A hot box in cold weather is due to excessive friction and the absence of lubricant—the lubricant acts as an agency to supporting the journal and the journal bearing; when there is an agency that supports these two agencies they don't get hot, but in the absence of this lubricant they get hot and if not looked after in time this burns off. Cold weather has a tendency to bring about the absence of lubricant. It freezes up and it becomes thick and therefore doesn't follow the journal around until the train again is in motion which heats on account of this friction—heats the journal—the journal gets hot and heats the lubricant and that causes it to flow and follow the journal around; now then when it is froze up there is an absence of this lubricant and therefore the journal bearing is snug on the journal and it turns hard; just as soon as it is lubricated it moves freely—that is the action that cold weather has on the lubricant.

By the COURT: Don't you have these hot boxes in hot weather?

A. Yes, but more rarely than in cold weather.

During the cold weather in addition to the length of time that  
187 you have to wait for train to pass you when it has the right  
of way over you there is some delay in getting started by  
reason of cold weather when ready to start. I find in my

experience that a delay—at we will say ten degrees or more below zero, if the delay is in excess of fifteen minutes, or twenty-five minutes, then the train becomes what we call frozen up—that is a term that is understood by railroad men very readily which means the freezing up of this lubricant—it don't move readily because each journal bearing or each journal wouldn't get this lubricant; now then in connection with that in cold weather we also have what we call the air froze up—that is another railroad term and readily understood by railroad men. That means that since the air brakes are operated by compressed air which only effect the train line pipes and connections, etc., which are necessary for the manipulation of these air brakes; after it has once been charged and there is any leak in them occurs—in that train line—it will automatically set the brakes—we have on each car—on each end of it—a hose coupling; the air hose being of rubber it gives more or less when they slack the train and when the cars pull out when going; this air hose allows for all of this movement without spreading excepting in cold weather the hose becomes frozen and instead of giving it spreads—that is what we call the air froze up. We have to repair it before going on because it automatically sets the brakes

and it stops the train. All of the delays which I have referred  
188 to here were not caused by the cold weather, which brought about the friction in the journals and the trouble with the air hose, some of them were due to meeting other trains. I have also explained delays on account of the friction in the journal and the air hose getting out of repair.

#### Cross-examination.

By Mr. AITKEN: I will go over that entire delay report for you again. Dickinson, one hour and thirty minutes to meet No. 7, first class passenger train, westbound. There are no first and second class passenger trains—they call it a first class train; and also No. 979, a local freight. Gladstone, five minutes waiting for orders; Richerton, twenty minutes on account of the air hose leaking; Hebron, thirty minutes meeting first No. 5, and ten minutes at the same place on account of the air hose leaking; Eagle's Nest twenty-five minutes meeting Second No. 5; Glenollen, fifteen minutes taking coal and water; Kirtz, ten minutes meeting No. 603; New Salem, fifteen minutes letting No. 6 pass; Sedalia, thirty minutes to meet No. 1 and twenty minutes on account of the break in two; Sweet Briar, fifty minutes on account of hot box.

Q. That is a total delay of six hours is it?

A. Is that what you compute it—I didn't compute it.

Q. Figure them up?

A. I get it five hours and fifteen minutes.

Q. Maybe I am off—I have 360 minutes.

189 By the COURT: That is close enough, proceed.

A. I had computed it on a different basis—I got it mixed with trains running so much late—for instance, train due at 5:25 running fifty minutes late would make it 6:25.

My figures are not correct, it is six hours even. I was nine hours and fifteen minutes going from Dickinson to Mandan.

Q. Take six hours from that makes three hours and fifteen minutes running time.

A. I arrived at Dickinson at 11:10 P. M. and arrived at Mandan at 8:25.

Q. That makes what?

A. Nine hours and fifteen minutes.

Q. So that—.

By the COURT (interrupting) : One hour and twenty minutes was before he left Dickinson.

That would leave four hours and thirty minutes' actual running time between Dickinson and Mandan, 110 miles, or in the neighborhood of 25 miles an hour, so during the actual running time I was making 25 miles an hour over the track in spite of the cold weather, and in spite of the whole delay I made that one hundred and ten miles in nine hours and fifteen minutes, which — all these sundry delays. That is a little over ten miles an hour.

Q. Do you know how far it is from Belgrade to St. Paul?  
190 A. No.

By Mr. HALL: We will admit whatever that time table shows there.

By Mr. AITKEN: It shows 1042 miles.

By Mr. HALL: All right, sir.

By Mr. AITKEN: Let the record show that defendant admits that the distance from Belgrade to St. Paul is 1,042 miles.

I was delayed an hour and one-half at Dickinson waiting for No. 7. I don't know of any next meeting point east of Dickinson. The next siding is Lehigh, and that is four miles and six-tenths miles.

Q. Do you know what was to prevent you from going to Lehigh to meet No. 7—you had an hour and one-half to do it.

A. Well, I don't know what the time—or rather I will say that the schedule of No. 7 was at that particular time—the one I have at present is a later schedule—but the schedule of No. 7 possibly didn't allow me to proceed to Lehigh on account of it being a superior train. I said I was delayed at Dickinson one hour and one-half on account of waiting for No. 7 and the local freight. I don't remember what the reason was that I didn't go ahead those four and one-half miles to Lehigh, but it is possible I had orders to meet No. 797 at Dickinson—I wouldn't need any orders, the fact that the train register showed that they had not arrived—being overdue, wouldn't allow me to proceed to Lehigh.

191 Q. If they were forty miles down the valley—

A. (Interrupting.) Excuse me, I will correct that in regards to 797, being an inferior freight train—but it wouldn't allow me to proceed to Lehigh against No. 7 if No. 7 hadn't yet arrived at Dickinson.

Unless I got orders, and I don't suppose I did. If they had given me orders to meet No. 7 at Lehigh I would have gone. It

depends upon the circumstances whether I would consider holding a train one hour and one-half when I could go four and one-half miles and get on a side poor railroading. The natural effect of a hot box is as the journal gets hotter the lubricant loosens up. So if there is enough lubricant in there the hotter the box gets the freer it will flow.

C. W. HOUSE, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. HALL: I live at Billings, Montana. I hold the position of general yard master at Billings for the defendant company. I have jurisdiction of the stock yards there as part of my duties. The last time I was in Billings was two years and one-half. I have handled more or less stock all the time I have been on the railroad and that is thirty years. I remember, and have also refreshed my memory, regarding the shipment of four cars of cattle from Belgrade, Montana, on January 2, 1912. The cattle 192 arrived in Billings on the morning of January 3rd, at 8 o'clock. We found them on the rear end of the train and took a switch engine and went up and got them and took them to the stock yards and unloaded them. We unloaded at 8:45—it is over a mile from the stock yards to the freight yards—the man in charge came in and wanted to know—he came in and wanted to get out—we had been notified of ten cars of sheep coming from Bridger, but on account of the storm at Bridger they didn't load—

Q. They wanted to know when the Bridger stock would arrive?

By Mr. AITKEN: Objected to as leading.

Q. Did they say anything?

A. They wanted to know when they could load up again, and we told them that they—that if the Bridger stock was loaded they would go with them; it was stormy around Bridger and they didn't load.

Q. When was the next train?

A. 602—don't load any stock on the dead freight—we asked Glendive if any connection for the drag so we put the stock on—602 was the only train we could load the stock on—we put time freight and perishable stuff on 602.

If they went down on the drag when they got to Forsyth they would have to unload again—we have to take it up with the chief dispatcher and find out whether they are running a special or not

before we can put time freight or stock on a drag. The 193 switch engine went down to load the cattle at 4 o'clock on the morning of the 4th for 602, and they were loaded at 4:25, but did not leave until 7:25. As to what caused the delay from the time they loaded until they got out, 602 was reported in at 4:02. Laurel is the freight terminal for 602—they were delayed

there in making up and didn't get down there until 4:40. As to there being any cause that delayed 602 after it got there, there was a congestion of passenger trains there—there was the Q. local there—they had about 1800 tons; and when they pulled out they pulled the draw bar out; and that fouled the switch for 602 that was standing there; No. 43 also came in that morning during that time and No. 2 going east; of course 602 could follow right behind No. 2; the best she could do would be ten minutes in the rear of No. 2. I have loaded and unloaded a great deal of livestock in my time. In my experience I have never seen over 22 head of fat cattle put in a standard car, 36-foot car, Northern Pacific special. There were four of these cars, 36-foot Nort'ern Pacific stock cars. As to whether these shippers made any complaint about the cars they started in, at the time the switch engine went down at 4 o'clock in the morning was the first complaint—they made complaint about the cars not being in good shape and on the 30th of December we sanded twenty single decks; had them all inspected before we took them to the yards to be sanded—they were to be sent to 194 Seattle—sanded them with homesteak and granite—the best kind of gravel—we sent twelve of them away—sent them to Seattle and we had eight of these cars there in the yards all sanded, and we gave them four of these sanded cars out of Billings.

Cross-examination:

By Mr. AITKEN: I do not rely on my memory as to the time of the arrival and departure of these trains. We have a register there. It is in Billings—the train sheet will also show it—the time of the arrived in Billings on the Montana division, and the Yellowstone train sheet will show the time of departure of these trains.

Q. Can you read those train sheets?

A. Yes, I can read figures.

By Mr. HALL: We object to that—the train sheets have been put in evidence.

By Mr. AITKEN: The train sheets have not been introduced in evidence.

By the COURT: I think the matter is sufficiently in evidence, but if you want this witness to look over these train sheets and take up the time here why you can do it—I don't care. To which ruling of the Court and defendant duly excepts.

By Mr. HALL: Mr. Weston has testified to all of that and I thought you kept a note of that so we wouldn't have to go into it again.

By Mr. AITKEN: If Mr. Weston testified to that I don't 195 want to go into it again, but I don't recollect that he did—can you read those train sheets, did you say.

A. Yes, there is the time that 602 left there—7:25. (Witness refers to time sheet.)

It don't show when they loaded out on the train sheet. The stock yard register at Billings shows the time the stock were loaded out—they have a record of the car number and everything there. As to whether I mean to say that it is not possible to load more than 22 of

14 and 1500-pound cattle in a 36-foot cattle car, I have unloaded a great many cattle and loaded them in my time and I never saw fat cattle going into the Chicago market with over 22 in a 36-foot car. I mean by "fat" cattle what you call "beef" cattle, I suppose. I have loaded them for Chicago out of Billings and also loaded them for Seattle and Spokane and I never saw over 22 put in a 36-foot car. That was in all seasons of the year, fall and winter and spring.

Q. The capacity of these cars are what?

A. A 36-foot car?

Q. Yes, what is the minimum load?

A. Seventy thousand capacity.

Q. Seventy thousand capacity?

A. No, sixty thousand capacity.

Q. Is that the maximum load or can you load over that?

A. I don't think you can overload them; the McDonald brothers when they ship only load 18 to 19 when they are extra heavy cattle.

196 Q. One of the witnesses testified that the maximum load for shipment was forty thousand pounds.

By Mr. HALL: No that is the minimum weight, they can put in.

I don't know what is the minimum load of a live stock car, nor do I know what the maximum load is. I have been on the railroad since I was fifteen years old—I have been switching and braking since I was 17 years old, and in all my experience in railroading I have never seen more than 22 cattle in a 36-foot stock car, not fat cattle. If these are not heavy cattle you can get thirty-five or forty of them in there. I mean by heavy cattle four-year-old steers or three-year-old steers, heavy beef cattle. A 1400-pound steer is pretty heavy, I think. The time these boys that were with the cattle made their complaint was when I went down to load—when the switch engine went down to load; they didn't say anything about the cattle—they didn't say anything about the cars when they came in to see when they were going to get out. I didn't hear any complaint when they first arrived there. They made complaint to the stock yard man and the switch foreman that went down to load them at 4 o'clock. All I know is that the record shows and what they told me.

Q. How did you know it?

197 A. The next morning I saw them changing stock cars—  
changing the four that they came in with for the four that was sanded for Seattle—I asked them what they did that for?

A. Are you testifying from what they told you or what the record shows.

A. The record shows they sent—that they were sent out in four different cars.

Q. My question is are you testifying from what they told you or from the records?

A. From both.

Q. I move to strike out the testimony with reference to this on direct examination upon the ground that if he is testifying from a

record the record itself is the best evidence and if testifying from hearsay it is inadmissible.

By the COURT: He is testifying from the records that are used in the general business there—

By Mr. AITKEN (interrupting): Then it is hearsay.

By Mr. HALL: We should have objected before to that.

By the COURT: I will deny the motion; to which ruling of the Court the plaintiff duly excepts.

Redirect examination:

By Mr. HALL: As to what I have to saw as to ordinary range stock averaging 1350 pounds, that is pretty near as heavy as the McDonald Brothers and Fry-Boner & Co. load for Seattle. They are mixed stock, I suppose, fattened there at the beet factory.

Recross-examination:

By Mr. AITKEN: I seen these cattle and helped load them.  
198 I only had McDonald's word for what they weighed.

Q. I move to strike that out because it is purely hearsay.

By Mr. HALL: What the witness testified to was that they were—that 1350 pounds were nearly as big as his cattle were.

By Mr. AITKEN: No, he didn't.

By Mr. HALL: That is precisely what he said.

By the COURT: Strike that out; to which ruling of the Court the defendant duly excepts.

E. W. WESTON, a witness on the part of the defendant, being recalled, testified as follows:

Direct examination:

By Mr. HALL: I have the train sheet showing the movement of trains out of Dickinson on the 6th of January. Mr. Steinbrueck was the conductor in charge leaving Dickinson.

By Mr. AITKEN: If that is for the purpose of impeaching what Mr. Steinbrueck testified to I object to it.

By Mr. HALL: It is not for the purpose of impeachment. It is for the purpose of explaining the delays on this time sheet.

By the COURT: Go ahead with the question.

The delay of one hour and thirty-five minutes before leaving Dickinson was caused by trains No. 7 and 797. The delay of 797 was caused by meeting another eastbound train at a blind siding—  
199 the first blind siding east of Dickinson. That siding is at Lehigh. That is four and five-tenths miles out of Dickinson. 797 left the last telegraph office at 8:20 P. M. and the eastward train they met at Lehigh that caused the delay left Dickinson at 8:25; under ordinary conditions without anything unusual happening that would give them ample time for both trains to go to Lehigh and meet or pass—797 could have got into Dickinson ahead of No. 7 and caused less delay to this stock train, but for some reason—we

are not able to say what it was, probably because of cold weather or any number of things—they couldn't do this, therefore 797 had to remain at Lehigh for No. 7 to pass and then follow them in; didn't get into Dickinson until 11:35; the stock train left immediately upon their arrival; there are conditions that cannot be foreseen. After leaving the division point at 7:35 they arrived at Mandan at 8:45, that would be nine hours and ten minutes. You can figure up pretty closely the amount of time lost by delays in the way of meets from the train sheets—

By Mr. AITKEN: If the Court please I was stopped last night from asking the first witness to go over this again; now they themselves are seeking to go over this again.

By the COURT: If you want to object, object to it.

By Mr. AITKEN: I don't want to object.

The train sheet shows five minutes delay at Gladstone and  
200 fifteen minutes at Richerton, thirty-three minutes at Hebron,  
eleven minutes at Glenollen; ten minutes at Kurtz, eighteen  
minutes at Sweet Briar; then there is a delay at New Salem and  
Sedalia which—which are sidings where they have no telegraph  
office, but the delay must be estimated from the train sheet from the  
distance and the usual stop of trains; the two delays should be about  
thirty minutes. Thirty minutes together.

By Mr. AITKEN: That would be fifteen minutes at each place?

A. It might be five at one place and twenty-five at another—I  
can't tell.

By Mr. AITKEN: It would aggregate that?

A. Yes, it would aggregate that much; those are the delays as I  
figure them from the train sheet.

There is a discrepancy in the train sheet and the last conductor's  
delay report. A copy of the conductor's delay report shows fifty  
minutes at Sweet Briar while the train sheet shows but eighteen.

Q. That would be two hours and two minutes' delay—from the  
figures you have given and the figure up two hours and two minutes—  
what have you to say as to these delays as to whether they  
are unusual delays in the ordinary transportation—

By Mr. AITKEN: I object unless the witness knows what the de-  
lays were—he can't tell whether they are reasonable or unreasonable  
unless he knows what they are caused by.

By Mr. HALL: The train sheet shows that.

201 A. I can figure out most of them, yes sir; the five minutes'  
delay at Gladstone—the train sheet doesn't show—it is a  
telegraph office and evidently an ordinary stop; it is not unusual  
for a stop; you can't make a stop short of five minutes; the thirty-  
three minutes at Hebron; I can't tell you the meet at Hebron be-  
cause that evidently was the train on the other sheet—

By Mr. HALL (interrupting): We will withdraw that question—  
the conductor yesterday explained the causes of these delays; we  
won't take the time at this time to go into them again.

## Cross-examination.

By Mr. AITKEN: Referring to the delays at Sweet Briar and other places, it is not evident that the train sheet is incorrect. It is quite evident that either the telegraphic report or the train sheet is incorrect. They sometimes vary. The conductor in charge of the train might know more about it than anybody else. He is the man that makes the delay reports at the end of the trip. That is a copy of it. (Indicating.)

Q. Have you any objection to putting that in—it is a copy—

A. (Interrupting.) That is not the original that the conductor made out.

Q. It is a true copy?

A. That I couldn't say—I haven't seen the original.

202 By Mr. HALL: We do not admit that it is a true copy—it was telegraphed in and it might be a mistake.

Q. Have you any objection to it going into evidence.

By Mr. HALL: Yes, we object to it going into evidence. The train sheet shows the delays there.

F. M. SHINER, a witness called and sworn on behalf of the defendant, testified as follows:

## Direct examination.

By Mr. HARTMAN: My name is F. M. Shiner. I am a conductor in the employ of the Northern Pacific. I have been so employed since 1903. I was acting in that employ in January, 1912. My run was between Mandan and Jamestown. I recall the occasion of hauling four cars of cattle belonging to Mr. Wall at Belgrade that came into Jamestown early, in the early part of January, 1912. I remember the date. It was January 7, 1912.

By Mr. AITKEN: That is when it arrived at Mandan.

By Mr. HARTMAN: What I asked him was if he remembered the date of hauling these cars as January 7, 1912.

I first knew something about these four cars of cattle when we left Mandan—knew I had them in the train. I knew about them when we hitched onto them at Mandan and checked out. We left 203 Mandan at 12:50 P. M. on the 7th. There wasn't anything wrong with the cattle while they were in my charge. No complaint was made to me. I knew nothing about a cow being down. I left Mandan at 12:50 and hauled the cattle to Jamestown, and got into Jamestown at 6:50 the same day. When I got to Jamestown the cattle were turned over to the yard master; I registered in and that excused me from any responsibility to that train; I don't know anything that happened to them or anything about them after I got to Jamestown—another man took charge of them over there. Mr. Haines was yardmaster at Jamestown at that time. I had no trouble or delays on the run from Mandan to Jamestown only regular delays for coal and water as far as I know—in fact we couldn't have had in the run we made—we made

the run in six hours. That is the time of an ordinary run from Mandan to Jamestown; that is better than 602's time, our fast freight. This was not 602 I was hauling, but the time was better than her time over that district or subdivision, whichever you call it.

Cross-examination:

By Mr. AITKEN: It is 107 miles from Mandan to Jamestown, and I made it in six hours. I haven't stopped to figure the average number of miles per hour, but it was a good run. The date was January 7th. It was pretty cold. I have no idea of what the temperature was. I think it was below zero at that time and for several days in the fore part of January.

204 By Mr. AITKEN: That is all; it might please you to know if all of the runs had been like that this lawsuit would not have been brought.

Redirect examination.

By Mr. HARTMAN: The track from Mandan to Jamestown was not level, but was pretty level through. I don't think I had any meets on this date, unless it was No. 8, but I can't remember whether No. 8 passed me or not. We didn't have any unusual waits or delays. I did not have to wait at any time over fifteen minutes, not unless it was at Dawson for coal and water—it takes us about twenty or twenty-five minutes to take water and coal at Dawson. We have considerable trouble with trains freezing up in cold weather, if there is any delay for any length of time. If you allow your train to stand twenty minutes it makes it pretty stiff from there to fifty, at fifty minutes it will be entirely froze up so you couldn't move it at all.

Q. If you are not delayed so you can move your train under twenty minutes you don't then—am I to understand—you are not likely to freeze any—?

A. No, inside of twenty minutes you can get out in pretty good shape, but after twenty minutes—from there to fifty minutes you are up against it. As to what I have to say as to an ordinary wait for stopping that I would have in a trip from Mandan to Jamestown, if no unusual delays occurred, would be more or less than twenty minutes. It wouldn't hardly be any more than twenty minutes—hardly ever get delayed more than that—unless 205 another train you are meeting or something like that—unless it is delayed and you can't get by.

Recross examination.

By Mr. AITKEN: The only delay I met with on that run, that I remember of, was for coal and water at Dawson—that is the only one that I know of. I don't ever make out a delay report when I make the trip in less than the usual running time. I don't know anything about the grade from Livingston to Billings. I don't know how the grade from Livingston to Billings compared with the grade from Mandan to Jamestown.

E. C. RIGDON: A witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. HARTMAN: My name is E. C. Rigdon and I reside at Dilworth, Minnesota. I am a conductor for the Northern Pacific Railway. I have been in that business seven years. I was a conductor in January, 1912. My run was from Jamestown to Dilworth and Dilworth to Jamestown. I recall, in the early part of January, probably about the 7th or 8th, of hauling four cars of cattle shipped by Mr. Robert Wall of Belgrade, Montana. I first had charge of these cattle on the night of January 7th, at 7:20 P. M. At 7:20 P. M. that night I was ordered to take this train of stock and proceed to Dilworth with them. At that time they were in the yard at Jamestown. I had train 602 with four cars 206 of cattle in the rear end. There was no stock except the four cars on the rear end. There was a complaint made to me that there was a cow down in the car at Jamestown and they were going to transfer it and they decided not to transfer it and we proceeded to Fargo. Mr. Olie and Mr. Chris Hanson decided not to transfer it. I made a report on that and have it here with me.  
*made a report on that and have it here with me.*

Q. What was the report that you made upon that.

By Mr. AITKEN: Is this the original copy.

A. This is a copy of the original report.

By Mr. AITKEN: What became of the original report.

A. That was on file at Jamestown telegraph station—that was filed at the Jamestown telegraph station to my superintendent at Dilworth.

This is a copy which I kept for my own personal record. It was made at the time the original was made. It is a carbon copy.

By Mr. AITKEN: Carbon copy of the original?

A. Yes, sir.

By Mr. AITKEN: All right.

Q. What was the report that you made with reference to the incident of the cow being down and the transfer.

A. I will read it to you.

By Mr. AITKEN: I object to that on the ground it is a self-serving declaration.

207 By Mr. HARTMAN: If you don't want to know the facts as they happened we don't want to put them in.

By Mr. AITKEN: I don't want the facts as you want them put in and as you want them to happen. A man could make a report for his own purpose or for the purpose of his employer.

By the COURT: You made this statement at the time this matter happened?

A. Yes, sir; I did it for my own personal record because we have so much trouble with stock that I have to have some means to make a report of it to my superintendent—we can keep a personal rec-

ord—we can't, rather, have or keep a personal record of our; if we did we would have to have a private stenographer to the conductor.

It is a report that the rules require me to make to the superintendent and I kept a copy of it for my own satisfaction.

By the COURT: I think I will allow him to answer—objection overruled; to which ruling of the Court the plaintiff duly excepts.

This is dated at Jamestown, 8:25 P. M. "January 7, 1912—one cow down in Northern Pacific 91165; was going to transfer in Jamestown, but men in charge, Olie and Chris Hansen, decided not to transfer it; this to be placed with my wheel report for future reference." Signed by E. C. Rigdon, January 7, 1912. I attached this copy to the back of my wheel report. There is a statement there, required to be made out by the company, and this is practically the same thing—the only difference is in one place it says cow and the other place it says steer.

208 Q. Do you recall any conversation that took place between yourself and any of the men in charge of the cattle in reference to the transfer.

By Mr. AITKEN: I object unless it was a conversation with himself.

A. Yes, sir.

Mr. Oleo and Chris Hansen and myself and the yardmaster Haines at Fargo, South Dakota, were present when this conversation took place. As to what was said, they were going to transfer a car at Jamestown, but owing to the condition of the cow they said they couldn't save her and they would save the delay and proceed with the train. It would be necessary to proceed to the stock yard and take the cattle out and take this cow out and either leave it or pen it up, and they decided not to delay for that purpose.

Q. Was there any refusal made or suggestion or objection on the part of yourself to making this transfer?

By Mr. AITKEN: Objected to as leading.

By the COURT: I think it is leading.

Q. Was there anything said by any of those—by either of those men in charge of the cattle in the nature of a demand requiring them to make the transfer.

209 By the COURT: That calls for a conclusion.

Q. Was anything said about making a transfer at all?

A. No, sir.

By Mr. AITKEN: I object to that—

By Mr. HALL: The witness when on the stand testified they wanted to make the transfer and the trainmen refused to permit it—I want to find out from this witness if there was anything of that kind stated at all.

By the COURT: Go ahead and ask your question—I will sustain

the objection as the question stands. To which ruling of the Court the defendant duly excepts.

Q. Now what if anything was said by any one of those men in charge of the cattle with reference to the proposed transfer of the cattle and what was said by yourself in return to such statement?

A. They came down to the yard office and asked the yardmaster to have the stock transferred; he went back and I was going to take the stock to the stockyard and transfer it; when I arrived there after taking my engine from the head end to the rear end—I got there the same time the switch engine got there and they told him they wouldn't transfer the cattle.

The two Mr. Hanson told myself and the yardmaster that For a reason, they said they couldn't save it and they would let it go as it was. I left Jamestown at 7:28 P. M. January 7th, 210 and arrived at Dilworth at 7:40 A. M. of January 8th. It is ninety-eight miles from Jamestown to Dilworth. I had some delays on the trip. I couldn't tell you the nature of the delays minute to minute without referring to my train sheet. I made a delay report, but I haven't got that with me. I have the train sheet showing the operation of the train on that date.

Q. Refer to the train sheet and tell us about the delays.

By Mr. AITKEN: Are you a dispatcher Mr. Rigdon?

A. No, sir.

Q. I will ask you to state Mr. Rigdon whether or not from your examination of that train sheet and refreshing your recollection from it you can testify as to what delays you had on that trip?

A. I can give you a definite report from this train sheet.

By Mr. AITKEN: Did you make the train sheet?

A. No, sir.

By Mr. AITKEN: Do you know that it is correct?

A. Yes sir, it is correct.

Q. How do you know?

A. It is as necessary that this be correct as it is that there be an engine on a train.

By Mr. AITKEN: It is necessary that the sun should rise also.

211 By Mr. HALL (after argument): It is stipulated that this should be introduced in evidence after the evidence of the dispatcher—you can read that train sheet.

By the COURT: The witness will be permitted to answer the question. To which ruling of the Court the plaintiff duly excepts.

Giving you the delays as they appear from the train sheet. At Jamestown I was ordered for 7:20 P. M.; depart from Jamestown at 7:28 P. M., a delay of eight minutes. Arrived at Durham, which is the first station, at 8:52 P. M.; departed at 9:13, which would be a delay of twenty-one minutes. That delay was caused by meeting second No. 7. The next delay is at Eckelson, North Dakota. I arrived at 10 o'clock and departed at 10:10, a delay of ten minutes, which was caused by meeting extra 1577 west, which was 603's train of the 6th. That is a westbound time freight train running extra on this

date. That wasn't the regular time, it was a day behind time. I was delayed at Highbridge for water—regular water stop—the time doesn't show here because it has no telegraph station—it is a blind siding. That wouldn't be telegraphed in. I couldn't say how long I was delayed there. I did stop there to take on water. It was a regular stop on this occasion, otherwise it would show up on the delay report. It would not exceed ten or fifteen minutes. Arrived at Alta at 11:30 and departed at 2:20. The reason for that delay  
212 was to meet two first class passenger trains and one first class passenger train past—meeting No. 5 and No. 1 and allowing No. 4 to pass. Under the conditions that prevailed at that time, we would call that as an unusual delay—but under the conditions that prevailed at that time it couldn't be helped. The conditions that prevailed at that time were a very severe storm—severe cold weather and No. 5 and No. 1 were being badly delayed. My next stop was at Bracket—that is a coal and water station; I reached there at 2:50 A. M. and departed at 3:40 A. M. That made a delay of fifty minutes there. That was a coal and water stop and it required that length of time to coal and water the engine. Going back to Alta, where I was delayed two hours and five minutes waiting, I recall having difficulty in getting out of there. After the passenger trains had arrived and the main line was clear for me to proceed I couldn't go because my train was frozen up and I had to get help to get out; on that train I had my regular engine and I had to put on two helper engines to get started. That is three engines. I went from Alta after being helped out with three engines. The difficulty in getting out made up part of the two hours and fifty minutes delay. My next stop was Fargo, North Dakota. I was delayed there about fifty minutes taking on water, set out four cars of stock on the rear end of the train. That was the cars of stock involved in this suit and was all  
213 the cars of stock I had on that train. Altogether I had thirty cars out of Jamestown, and I had twenty-six cars out of Fargo. 1280 tons out of Jamestown, and 1160 tons out of Fargo. I cut out four cars of stock at Fargo. I didn't go out myself—the switch engine took them off; I delivered the bills for the cars at the Fargo freight office, but the switch engine took them off.

Q. You had no further handling of these four cars of stock?

By Mr. AITKEN: Objected to as leading.

I had no further handling of the stock after cutting them off at Fargo. They were taken to the stock yard at Fargo. From where I left them to the stock yard at Fargo would be a distance of about a mile. I didn't take them to the stock yard. They were taken to the stock yards there on account of the 36-hour law; they couldn't proceed any further without feed and rest on account of that law. My ordinary load on that trip was 2750 tons. 1100 was all the load we could handle at that time on account of the storm and cold weather. Cold weather has a very bad effect on the handling and managing and operation of the trains. It has a bad effect on both passenger and freight trains, all kinds of trains.

Q. You say it has a very bad effect—can you explain something of the nature of the effect?

A. I can.

By Mr. AITKEN: That has been testified to at least four 214 different times—they have enough testimony on that point of the record.

By the COURT: Yes, unless they intend to produce something new.

By Mr. HARTMAN: Do you admit that?

By Mr. AITKEN: We don't admit anything.

By the COURT: Unless you expect to produce something new there is no use to put so much of this in.

It took me twelve hours and twelve minutes to come from Jamestown to Dilworth.

#### Cross-examination.

By Mr. AITKEN: I said I could tell you how long it took me to come from Jamestown to Dilworth. From the time I started until I got in was twelve hours and twelve minutes. I will take your report of five hours and twenty-four minutes as the time of the delays, but I didn't figure them up.

Q. That would leave you actual running time of about seven hours—a little less than seven hours.

By Mr. HARTMAN: Six hours and forty-eight minutes.

That is an average of about thirteen or fourteen miles an hour of running. ...er of the Hansens requested me to unload the stock. They requested the yardmaster and I was there at the time. They asked to have the cars transferred at Jamestown. Transferred is what they said, that would mean the unloading. The yardmaster told them all right. He was quite willing to transfer them.

215 The request was deferred. I had a light tonnage out of everywhere, not Alta, but everywhere. 1228 tons out of Jamestown. That is west of Alta—1280 tons I mean out of Jamestown, North Dakota. I had the same out of Alta. The grade is level in the position I stood—it is inclined to be a fraction up hill east. I did not start out of Jamestown with three engines. I got the three engines at Alta, and I got three engines because I was froze up there and couldn't get out on the main line. There was a very light grade there to the east. It did not increase as I went towards Fargo. About a half a mile east of there we tipped over the top of the mountain and came down hill. There is enough grade there so you can call it the top of the mountain. I dropped the extra engine right there at the top of the hill. They pulled me about a half a mile and I didn't need them any further—I could go by myself, after getting to the top of the mountain and dropping over.

#### Redirect examination.

By Mr. HARTMAN: As to what sort of a mountain is there, it is a helper division from Bracket to Alta—or a half mile east of Alta—that is westbound. It is not a mountain of the character you come

up over from Livingston to Bozeman. The distance is six miles and with our regular tonnage trains it requires a class T engine to push us up there, westbound; requires a helper. Eastbound we need no helper. I needed a helper that day because I was on the main line there—I was there two hours and four minutes—I was froze up; the dispatcher told us to get to Alta and he would get us out for No. 5 and No. 1 and when we got to Alta he told us to stay on the main line and he would get us out if possible; after we were there a while we couldn't get out or move; and we had to line the switches up and have No. 1 and No. 4 go through the switches. That is the time I put on the helpers. I got the helpers from Ariska, North Dakota. That is the first station east—a helper stays there all the time. The other helper came from Valley City—that is west of Alta—that is down in the hole.

E. C. RIGDON, a witness on behalf of the defendant, being recalled, testified as follows:

Direct examination.

By Mr. HARTMAN: In making out the usual delay report on this trip I do it in writing. Make it out myself and file it with the company. I haven't that with me, but I have a copy of it on the foot of the train sheet for the dispatcher's benefit. He made it off the telegraph report. That is a copy attached to the train sheet. That was copied by the train dispatcher as it comes off the wire. That copy is right here. (Refers to the train sheet.)

JAMES E. JOHNSON, a witness called and sworn on behalf of the defendant, testified as follows:

217 Direct examination by Mr. HARTMAN:

My name is James E. Johnson. I reside at Fargo, North Dakota. I am agent for the Northern Pacific Railroad Company at Fargo. I have been the agent there for thirty years. I was in charge there in January, 1912. I recall the occasion of four cars of stock having been shipped by Mr. Wall over the Northern Pacific in the fore part of January, 1912. I remember their coming to Fargo on that occasion. I had nothing personally to do with the handling of them while there. I had a conversation with the parties in charge of the shipment. When I came to work that morning about eight thirty I found these men in the office there and they told me they had four cars of cattle in route to Chicago and had been badly delayed between Dickinson and Fargo and one dead, and he wanted to know what — going to do with it; I told them if they had had bad luck we would take it out of the car and we wouldn't charge them for burying it—I told them if — any complaint they — had better put it in writing so we would have it on file—that is the last I saw of the men. There was a report made in writing. That is the statement signed by them here in evidence. I have been in charge of railroad stations for about forty years altogether and I have been in con-

tinuous service at Fargo for thirty years. As to what observation I have made as to the loading of stock cars. I have been there all the time—that work is done by the yardmaster, and the switch foreman—we tell them what is necessary—we advise the yardmaster's office what is necessary, and the work is done—great number—a great many times I have been around and noticed them loading but I never handled any—never done any loading myself. As to the number of cattle weighing 1,350 or 1,400 pounds that should be put into a car for safe and proper shipment, I have inspected the billings a great deal and they have shown from twenty to twenty-two—I think twenty is about as many as they ought to put with safety. At Fargo these cattle were watered and fed. I believe they were, but they were taken to the stock yard—I know that they were unloaded and we ordered some hay for them—I think they got it. The water there is our regular city water. That is all that the railroad has and it is used by the people in town, unless it is people that buy private water—that is the water that goes through the mains.

Cross-examination by Mr. AITKEN:

At that time of the year those stock yards are not used much; they generally plan to feed and rest at other points—we have very little stock at Fargo—it is only used when stock comes in from the east that has to be inspected—North Dakota won't accept any stock from Minnesota unless they have a bill of health from the officials—that is not a regular stock place—regular feeding and resting place. I don't know how long before that it had been used.

There wouldn't be any sediment in the pipes. The water comes from the river—the ice was frozen up in the river, but at that time of the year it would be all right; in the spring it might have been a little muddy there. It would not have been three months before the last time we watered cattle there. We generally have stock there once a week. I said I didn't know how long before that it was. I didn't see the water myself. As to whether I am just drawing conclusions from other known facts and not what I myself knew on that occasion, I know I have used it in my bath tub in the winter and we generally take a bath or two in the winter. I have slipped into the stock yards once or twice and taken a bath. I have been agent at Fargo thirty years continuously. If I am lucky and they don't fire me I hope to be on the pension list pretty soon. As to whether I ascertained from the bill about the number of cattle shipped, I saw the billings as they passed my office. By the bill I do not mean the contract—if three or four cars they would say fifty or 100 head or whatever it is but on the way bill it would say just the number they had in the car and it would be twenty or twenty-two or whatever it is. I have never loaded any cattle myself and never unloaded any. So all I know about the number of stock is simply what I would see on the way bill—the figures on the way bill. My clerk wrote this report in the office that was made out about the dead cow. I was there while he put it down—he signed it. They didn't write it. I didn't see it signed because I was

called away for a minute while that part of the thing was done—I came back afterwards and asked my man if it was fixed up and he said yes. I seen part of it written. To the best of my recollection both of these men were present when it was written.

Redirect examination by Mr. HARTMAN:

As to whether I know where my clerk got the information upon which he wrote out this report, these men made the statements—they told me they had bad luck all the way from Dickinson and that one cow was dead in the car and they wanted to know what to do with it; I told them we would take care of it for them. So I asked the men—so as to be on record—I suggested they get a record of this thing so I saw them preparing the sheet of paper that it was written on—I looked at it when I came back and saw these signatures on the bottom of it. The clerk put it down as they gave it to him—he acted as stenographer—an amenuensis.

Recross-examination by Mr. AITKEN:

To the best of my recollection that statement is the dictation of these men. They dictated it to my clerk.

E. W. FLINT, a witness called and sworn on behalf of the defendant, testified as follows:

221 Direct examination by Mr. HARTMAN:

My name is E. W. Flint. I reside at Fargo, North Dakota. I am a switchman for the Northern Pacific railroad. I have been employed at Fargo for three years. I was in the discharge of my duties as such employee in the early part of January, 1912. I don't remember of this shipment of four cars of cattle from Belgrade, Montana, through to Chicago, coming into Fargo in the early part of January. I remember taking them from there. I took the cars from Fargo. I don't remember of their coming in there. As to what I had to do with their handling there at Fargo, I went to Fargo from Dilworth with a switch engine and took these four cars of stock from Fargo to Dilworth. I made a report of what I did upon that occasion. This paper which you hand me is a correct statement of what I had to do with the stock. Refreshing my recollection from this statement, we went to Fargo and picked up the stock at 3:05 and went to Dilworth in twenty minutes, arriving there at 3:23; 3:05 A. M. the morning of the ninth. I was twenty minutes taking them to Dilworth. I took them to Dilworth to put into a freight that was ordered for somewhere around four o'clock to proceed to Staples. They were put in this freight. I don't remember when they got to Dilworth. All that I did was to take them over from Fargo to Dilworth, and put them on the rear end of the train that was going out. They  
222 were in the cars when I first had to do with them. As to the facilities for loading and unloading there at Fargo, there is only one chute—they can unload two cars at a time but only one car can be loaded at a time. This is by reason of the fact that they only have one chute. The switch at the chute there is only long

enough for two cars. They have not extensive stock yards there at Fargo. There is not very much stock handled there. When they do handle stock there it is principally for inspection. Stock coming from Minnesota into North Dakota or Montana. Fargo is not one of the regular feeding and stopping places.

Cross-examination by Mr. AITKEN:

I am switch foreman. Yard conductor is another name for it. On the reverse side of this report there is a place to report on weather conditions, but it is not customary for us within the yard limits to fill out these wheel reports.

Q. Here is another "If any complaint, name and place of complaint—live stock, perishable freight and other things on the back—you didn't make out these reports here.

A. I am not required to make any of those reports.

F. W. GRAHAM: A witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HARTMAN:

My name is G. W. Graham. I reside at Staples, Minnesota. I am a freight conductor in the employ of the Northern Pacific. I was in such employ as freight conductor in the early part of January, 1912. I remember of an occasion of handling four cars of cattle from Belgrade, Montana, to Chicago—that is shipped from Belgrade and consigned to Chicago. As to whether I had anything to do with the transportation of these cattle on the road from Belgrade to Chicago over my portion of the run, I couldn't state from memory but I have a record that shows that I handled four cars of stock billed from Belgrade to 136—that is Minnesota Transfer—destination I suppose would be Chicago. My run in from Dilworth to Staples. My run in 106 miles, according to the time card—that is the mileage basis we are paid on.

By Mr. AITKEN: It may be further.

A. I don't think so—we would get it if it was.

I have a report here which I can refresh my recollection from. It is my wheel report—I have a copy of it—I have a duplicate copy—it is made out in duplicate. It is a carbon copy of the original report—made out in my handwriting. From this record here it appears I was ordered to leave Dilworth at 4:20 A. M. on January 9th, 1912. I did not leave at that time. I left at 5:50 A. M., which is a delay of one hour and thirty minutes. As to what occasioned the delay, my record shows one hour and thirty minutes thawing out air and getting out of the yard at Dilworth on account 224 of train froze up. I rather think the weather was cold enough at that time to freeze up the train; the cold weather was what froze up the train.

Q. Have you any record of what the temperature was?

A. The train sheet for the Minnesota division of which I worked—the nearest point that the weather is given at that hour of the morning—five A. M. is at Glendon which is five miles east of

Dilworth and practically the same territory that Dilworth is in—Dilworth is five miles west—this train sheet shows the weather all along at different points on that division at different hours—

By Mr. AITKEN: Where was this?

A. At Glendon, five miles east of Dilworth—

By Mr. AITKEN: This was what date?

A. January ninth—the weather record here shows at Glendon—at five A. M. clear and calm—twenty-two below.

Twenty-two below zero at five A. M., that would be about the time I should judge we were frozen up—I got out of there at one P. M.—and the train sheet shows twelve fifty-five P. M.—a difference of five minutes. I will have to refer to my wheel report to give you the delays between Dilworth and Staples. The train sheet shows at Withrow, ten minutes for coal and water—and ten minutes to repack hot box 17628. The next delay was at Lark Park, fifteen minutes for coal and water. Labelle thirty-five minutes picking 225 up cars and cars rebrassed NP 17628 and NP 91165. Those numbers are the cars that were rebrassed at Labelle. The next delay was at Luce, fifteen minutes, hot box NP 17628 and 91165, repacked. The next was at Perham ten minutes coal and water and hot box NP 17628—car set out. For the next I will have to refer to the front of this—it shows at Wadena arrived at 12:07 and departed at 12:13, it would be six minutes for water. That is all the delays. These delays were not either unusual or unreasonable, I don't figure. As to the first delay of one hour and one half, I won't figure it unreasonable because I have seen larger delays than that from similar causes—up to five or six hours getting out of the terminal on account of the train being froze—I had two class T engines that were used on our division and possibly half a train that could be handled in good weather—it might be a little better than a half train. I had thirty cars, about 1,200 ton. I couldn't say exactly what my usual load in getting away from Dilworth was—the time card gives a rate—we worked on a sliding scale—the number of cars and the tons vary—it depends on the commodity of the train—a wheat car—we wouldn't handle as many cars or heavier stuff—but a class T engine is supposed to handle out of Dilworth fifty cars—one engine. We cannot handle our full tonnage in zero weather. We don't attempt to do it.

#### 226 Cross-examination by Mr. AITKEN:

Reduction of the tonnage does not overcome the effects of cold weather.

Q. If you reduce the tonnage to six hundred tons couldn't you overcome the cold weather—if the freeze up—six hundred tons of loads wouldn't make as many cars as six hundred tons of empties—

A. It depends on the number of cars you have.

The theory is to reduce the tonnage sufficient to overcome the effect of cold weather. They have to do it in order to get the cars over the road—and then you are apt to get up against the sixteen hour law.

Q. When cold weather comes along the tonnage is reduced to overcome the effects of cold weather—as Mr. Weston stated.

By Mr. HARTMAN: Mr. Weston didn't state that at all.

By Mr. AITKEN: The jury will know that.

As to how long it would take to freeze up a train in weather twenty degrees below zero, I think it would vary a great deal on the—whether the cars were loaded or empty—it would be pretty hard to determine. If a train was standing twenty or thirty minutes it will chill and it will be harder to haul than if warm—the longer it remained standing the harder it would get froze up until it is almost impossible to move it. Twenty or thirty minutes would chill a train but it wouldn't  
freeze it up. I don't know how long it would take to freeze  
it up.

H. E. BRADLEY: A witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HARTMAN:

My name is H. E. Bradley. I reside in Minneapolis, Minnesota. I am conductor on the Northern Pacific and was such conductor in January, 1912. My run was from Staples to Northtown. I am a freight conductor. Northtown is about three miles this side of Minneapolis—west of Minneapolis. It is 129 miles from Staples to Northtown. I remember taking part in the transportation of four cars of stock in the early part of January but as to where they were billed from I couldn't say. I remember the date on which I handled them. It was January 9, 1912. I handled them from Staples to Little Falls. That is thirty-four miles. I don't recall what time on the 9th I took charge of them. I will have to refer to the dispatcher's train sheet for that—I have no record of that. I am not an authority on this train sheet—I will have to call on someone that is better posted than I am to explain them to me. I can't tell there what time I left Staples.

By Mr. AITKEN: Why not let Mr. Weston give this.

By Mr. HALL: Mr. Weston has gone all over this.

228 A. Oh, yes, this train sheet shows I left Staples at four P. M. on the ninth and I got to Little Falls at two A. M. on the next day, the tenth.

Q. Now then just explain your delays and the reason why it took you that long to get from Staples to little Falls?

A. I will have to refer to this sheet—I haven't anything to go by.

By Mr. AITKEN: Just to save the record, we object to this witness testifying from a record which he had no part in keeping.

By the COURT: Overruled—the witness may use this to refresh his memory. To which ruling of the court the plaintiff duly excepts.

I recall that I was delayed about five hours and one-half at Randall on that trip. I can tell from my recollection and examination of the train sheet what was the cause of that delay. It shows that

I arrived at Randall at 5:25 P. M. and that No. six—I let it by me—a passenger train—and met 603 and met No. 1 and I met—I let fourteen and eight by me there. These trains all had the right of way over the train I was running. They were all preference trains—first class trains and second class trains—six hundred and three is a second class train. I recall something very unusual for a passenger train at that time. No. 1 hit a bad spot in the track which was caused by the track heaving about a mile east of Randall and the engineer thought that the train was off the track and he applied his air to the full extent—he did what we call dynamiting the train.

By Mr. AITKEN: How do you know this?

A. The engineer told me this.

By Mr. AITKEN: I move to strike it out on the ground of hearsay.

By the COURT: Strike out the testimony with reference to what the engineer told you—it is also leading and repetition.

The accident to No. 1 caused me to stay there about forty-five minutes more than I would have had to stay—if it had gotten there on the time that I had on No. 1 I would have gotten out of there as soon as they got by. I knew No. 1 was held up outside of the station thereabout a mile up because I could see the reflection of the head light as it came around the curve—it was on a curve when they stopped. The delay caused by the accident to No. 1 had an effect upon the freezing up of my train. It effected me on account of No. 1 delaying me there—the train got froze up so I couldn't move it. No. 1 got by because I was on the side track. The effect it had on my water supply was that I ran out of water, the engine ran out of water. The engine could run out of water in that kind of weather because it was necessary to keep the steam heat up so it wouldn't freeze up—it was almost—it used almost the amount of water as if it was working. I was obliged to cut the engine off the

train and go to Little Falls for water and that took two hours,  
230 I think. It is ten miles to Little Falls. When I got back from that trip to Little Falls for water I took what cars I could handle and took them to the next station, which was Darling. Just that part of the train which the engine would take, the head end. I am not positive whether these four stock cars were in the head end or not. I am not positive, but I believe they were. I went back and got the other part of the train. There were no other engines around there at that time. I hardly think there was anything else that a skilled railroad man could do, nothing that I ever heard of. As to whether Conductor Breckmer assisted me at all in the movement of this train, he caught me about a mile east of Randall and took it to Darling—shoved us into Darling—maybe he brought us to Little Falls—I am not quite sure. He helped me with the rear end. I couldn't say how much time I did consume by reason of this happening. I was gone about two hours for water. I have no record of how long each of the trips taking half of the train to the next stopping place took me. I didn't keep any record of it for the reason it was so cold I wouldn't have much chance to

be looking at the time. As to how it happened that Conductor Brechmer came along with that engine, he got out of Staples behind me and I don't know unless they ordered him to come down and assist me. I was in need of assistance. As to whether I turned

over the stock and the train to some one else at Little Falls,  
231 if I remember right I let him bring part of it over from Darling to Little Falls—I had to have water again and didn't dare stop. Conductor Brechman took the train from Little Falls on, some of it—I think he took both sections—I don't know as to that—after I got to Little Falls I had other work to do. I surrendered the train there.

Cross-examination by Mr. AITKEN:

If there was something I could have done to hurry up that train and get it over the road faster, and it was done, I don't suppose I would be working for the St. Paul division if that was the case. As to whether it is customary for railroad men to admit they haven't done what they ought to have done, we always try to do what we can. I cut off the engine and ran to Little Falls to get water. It was ten miles and took me two hours to go there with the engine alone and back—I wouldn't say for sure—it might have been one hour and fifty-five minutes or two hours and five minutes—I couldn't say but in around two hours. The engine was in good working order, and took me two hours to go ten miles with a light engine and get water and come back. That is considered good time under the conditions. I took part of the train to Darling when I came back, the first part. I don't know whether the stock were in the first part or

not without looking at the wheel report; that would show. I  
232 don't remember which end of the train the stock were put after I went out of Staples. I don't know whether it was in the front or in the back. I did not take the caboose with the front part of the train. The stockmen wouldn't likely be out there on the first part of the train with me. I took the first part six miles to Darling, and left it on the side track there and then I went back and got the rest, with the caboose and took that to Little Falls, clear through to Little Falls. I don't remember which end of the train the stock was on. I know why I didn't go on from Little Falls with the train, it was because I wouldn't have had time to get in. My sixteen hour limit would have expired before I reached Northtown. I don't recollect which part of the train this stock was on, whether they were in the head end or whether they were in the rear end of the train. I don't know whether the stock got into Little Falls first or whether the men in charge got there first.

By Mr. HALL: Here is the wheel report—he can tell you by consulting that.

As to whether I can tell from this wheel report where the stock were, whether in the front or rear of the train, we always take our check from the rear end of the train so that would show that those four cars of cattle were the last ones I took the check of and that would be on the head end—we commence at the caboose. Accord-

233 ing to that I took the cattle to Darling, sidetracked them there and went back to where the balance of the train was and picked it up and took it on into Little Falls. I left the cattle on the side track at Darling. The reason I didn't pull the first part of the train into Little Falls was because I had supposed I could take the first part right through to Little Falls, but it wasn't customary to go by two or three stations—we got to the first station where there was track room and put them off there. It was not feasible to take the second part of the train as far as Darling and then go on in with that part that had the stock, for the reason there was a train there that was going to pick up the stock and go through. I know that because he shoved me over from Randall to Darling. I stopped at Darling. I don't think he had any train. You will have to ask him whether he brought in the rest of the train. I don't know how much he brought in. The fact is I cut off that part of the train containing the cattle—took them to Darling and sidetracked them and came back and got the other part of the train and went on into Little Falls, and passed the cattle. This is a wheel report. That is not the regular delay report. We have a regular delay report which we make. I made one, but I haven't got the copy of it.

Redirect examination by Mr. HARTMAN:

234 It is not customary when you have to cut a freight train in two and move it in section, to unhitch the engine from the front section and switch back and hitch onto the hind section and haul it first. If I had done it that way I couldn't have gotten it at all.

WALTER BRECHMER: A witness called and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. HARTMAN:

My name is Walter Brechmer. I reside in Minneapolis, Minnesota. My business is freight conductor on the Northern Pacific. I have been in that business seven years. I was engaged in that employment in January, 1912. My run at that time was between Staples and Northtown Junction. Northtown Junction is our termination. The Junction has been take-off—it is simply Northtown now. It is located about four miles north of Minneapolis or west of Minneapolis—I don't know which direction it would be—we call it west. As to whether I remember handling four cars of cattle consigned to Wood Brothers at Chicago, shipped by Mr. Wall from Belgrade, Montana, about the tenth of January, 1912, I remember of handling a consignment of four cars of stock—I don't know who the consignees or the consigners were. I took the cattle up at Darling and handled them to Northtown. The way I happened to pick them up at Darling was because Mr. Bradley set them out there. I 235 wouldn't be certain as to the time without looking at the train sheet. I have the train sheet with me. Refreshing my recollection from the train sheet, and as to the time when I picked these cattle up, I arrived at Darling at 1:20 and left there at

2:08 on January 10, 1912. As to whether I came into Darling with a train, that depends on what you mean by a train—we had an engine and a caboose—that is supposed to be a train—we didn't have any freight cars. The reason why I was running that engine and caboose alone, and without any freight cars was when I started out on the trip I was doing local work from Staples to Little Falls and I had the way car—When I took these cars up I set the way cars out because there was no further work for that—the last work for the way cars was at Randall—I set the way cars out at Randall. I had no information about these cars at Darling or any orders. After I left Randall I went to Darling for the purpose of taking charge of them. I got my information at Randall that caused me to go to Darling from the chief dispatcher. As to whether I had anything to do with the assisting of Mr. Bradley to pull any part of that train, I assisted him from about a mile east of Randall into Darling with the rear of his train, just pushing. He left me at Darling and I picked up what cars he had set out there. These stock were in those cars there. I pulled them to Little Falls. As to how far behind Mr.

Bradley I run, and how long after he got in before I got in, I  
236 couldn't say as to the time—the distance is about four miles or a little better, I think—as soon as he cleared the block I proceeded, from Darling to Little Falls. It took me about ten minutes, I should judge, to make the run from Darling to Little Falls. When I got into Little Falls I picked up the balance of Bradley's train and took it into Northtown. It is a little better than ninety-three miles from Little Falls to Northtown. I was about six hours making the trip. I arrived in Northtown about ten thirty A. M. I left Little Falls at 2:08 the same day.

By Mr. AITKEN: Left Darling at 2:08?

A. I left Little Falls at 4:20 A. M. and got into Northtown at 10:30 A. M. on the morning of the tenth.

Cross-examination by Mr. AITKEN:

I haven't any idea as to how cold it was that morning when I left Staples, but it was somewhere around about twenty-five below zero—that is my recollection. I don't know anything about it at all when Bradley started out with his train.

H. E. BRADLEY: A witness for the defendant, being recalled for further cross examination, testified as follows:

Cross-examination.

By Mr. AITKEN:

I don't know how cold it was when I started out of Staples. It was good and cold, but how cold I couldn't say. That was 237 the 9th of January. As to how many engines I had, I couldn't say as to that because there were engines there that shove the other trains out when they start them off. I had one engine when I got out on the road. As to whether two engines would not have been better, I got along better with one engine until I got

to Randall. If I had had two engines at Randall it would have been better. The weather got colder.

Redirect examination.

By Mr. HALL:

I did not have a full load on the train on that trip for the engine. In fact I had only a little better than half a load.

F. M. MAHER: A witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. HALL:

My name is F. M. Maher. I live at St. Paul, Minnesota. I am working for the defendant, the Northern Pacific Railway Company. I am a clerk, stock clerk, in the superintendent of transportation's office. My office has the record of the movements of trains. I know that the 36-hour release was signed by the shippers. We have the release.

Q. Let the record show that the 36-hour release was signed.

By Mr. AITKEN: We don't dispute that.

Q. I will ask you to refer to that 36-hour release and read the printed condition upon it.

238 A. "Form 527—Northern Pacific Railroad Company—I hereby request that the period of confinement for the stock contained in cars herein detailed and described may be extended to thirty-six hours—this request applies to each time they are unloaded until they arrive at destination;" signed by R. J. Wall.

By Mr. AITKEN: What is the date of it?

A. Belgrade, Montana, January 1, 1912.

By Mr. AITKEN: January 1st?

A. January 2nd.

I have figured up from my record as to the time of the run of this train. From the time it left Belgrade until it arrived at St. Paul, and deducting therefrom the time the stock were unloaded at various points, was one hundred and ten hours and thirty minutes.

By Mr. AITKEN: To St. Paul.

A. Yes, sir.

By Mr. AITKEN: Deducting feed times?

A. Yes, sir.

The distance from Belgrade to St. Paul is ten hundred and forty-two miles. That is to what we call Mississippi Street, and from there to the stock yards is about eight miles. So that the distance the stock ran from the time they were loaded until they were unloaded in St. Paul would be 1,042 plus eight, or 1,050 miles. This period of one hundred and ten hours and thirty minutes includes all stops

239 or delays such as meeting trains and other cases except the period during which the stock were unloaded for feeding and resting and water or for some other purpose for which they were

unloaded. I heard the testimony of Mr. Kartes on cross examination as to the running time of the time freight or the time they advertise to make from Bozeman to St. Paul, ninety-six hours. That period on the movement of that train also included the necessary delays for meets and so forth.

Q. What then is the difference between the actual running time of this stock, eliminating the periods which they were unloaded, and the running time of their fast trains?

A. Ninety-six from one hundred and ten—fourteen hours and thirty minutes.

A stock run is a train that has ten or more cars of stock and it has the right over all trains except passenger trains. It doesn't make any difference how many cars of dead freight there may be attached to that train as long as it has ten cars of stock. In other words, if there are ten cars of stock in that train it is then designated as a stock run, and is given the right of way over everything except passenger trains. I have no regular published schedule for a stock run. I have no basis on which I figure that the average running time of a stock run should be from one division to the other. They figure on what stock trains have made that run along without delays and we check these as good runs.

240 Q. From the customary or ordinary run of stock train from Belgrade to St. Paul, from your investigation of the usual schedules made under normal conditions how does their running time compare with that of the time freight—602, for instance?

A. Why we figure it about 60 hours for a stock train and then it is ninety-six hours on the time freight—that would be thirty-six hours' difference.

By Mr. AITKEN: Between Belgrade and St. Paul?

A. Yes, sir—well that is—ninety-six hours was to Bozeman—Belgrade isn't much difference.

There is about thirty-six hours' difference actual running time, eliminating time they feed, between the time freight and the stock train; that is, under conditions where there are no delays. I have records showing when stock were fed at Fargo.

Q. Can you tell from this—from these records when the last stock were unloaded and fed at Fargo prior to January, 1912?

A. Eastbound stock?

Q. Any stock?

A. I haven't my westbound book here.

Q. All right, eastbound stock?

A. Prior to January, 1912?

Q. Prior to January 7, 1912?

A. There was a car of horses from Oakes, North Dakota, unloaded at Fargo December 30, 1911.

Unloaded December 30, 1911, and departed December 31, 1911. I don't seem to locate any more for December. I don't find any between December 30th and January 7th. There is one December 7th. I didn't bring the records of westbound, and I think they feed more often at Fargo on westbound than they did on eastbound stock. Because the time is pretty near

up when they get to Fargo—if they get in in good shape they go to Jamestown—and then they have to be inspected. I really don't know of any requirements going west about inspection before entering Dakota.

Q. What have you to say as to whether this run—under the conditions that is disclosed by the records here, as to whether it was a reasonable or unreasonable run?

By Mr. AITKEN: I object to that unless the witness is qualified to show he knows—I offered that kind of testimony yesterday and it was ruled out on objection.

By the COURT: You should qualify him—

As to my duties as to checking up and making records of all the runs of various trains, I keep a record of every car load of stock shipped over the Northern Pacific Railway and I figure on time on stock trains and look after all stock—if there is any unreasonable delay why I find out about it. All delays and amounts of every delay are reported to my office, and I make a record of those reports.

By the COURT: Does these reports just cover stock trains  
242 or any train that has a car load of stock on it?

A. Any train that has a carload of stock on it.

Q. From your experience in the examination of the movements of trains and from keeping records of the movements of all trains handling stock I will ask you what you have to say as to this particular run under the circumstances disclosed in the evidence in this case, whether it was an unreasonable run or not?

A. It was a good run—I have drawn off shipments that were made around that time right from this locality and it showed better than they do.

#### Cross-examination.

By Mr. AITKEN:

My record shows the total time these cattle were on the way from Belgrade to St. Paul, and the total time is 187 hours and twenty minutes. My record shows when they left Belgrade. It is 3:15 P. M. on January 2nd, 1912. My record shows when they reached St. Paul and the time is 11:35 A. M. January 10th. My record shows how much time was taken out for feeding at Billings—he said twenty-three hours and fifteen minutes.

Q. How much of that was for feeding?

By the COURT: Do you keep a record of the time that the stock are taken from the cars and put back on the cars at these feeding stations?

A. Yes, sir.

By Mr. AITKEN: I want the difference between the time  
243 they were on the cars—when not in a feed station?

By the COURT: You wanted the time that the cattle were off the cars for feeding purposes in Billings—he said twenty-three hours and fifteen minutes in Billings.

By Mr. AITKEN: That is the total time.

By the COURT: Is that the total time at Billings?

A. Yes, sir.

Twenty-one hours and forty minutes of the time at Billings was for feeding. I wouldn't say it was a delay, but the difference between the time for feeding and the total time was two hours—one hour and thirty-five minutes. So there was twenty-one hours and forty minutes for feeding and one hour and thirty-five minutes accounts for all other stoppings at Billings. We fed at Dickinson thirty-one hours and fifteen minutes. That was the actual feeding time, from the time they unloaded until they loaded. There was one hour and fifty minutes more time occupied for other things. At Fargo the feeding time was eighteen hours and twenty-five minutes. The balance of the time there was two hours and five minutes.

Q. Two hours and five minutes—now at St. Paul.

A. I haven't that at St. Paul.

Q. You haven't got it at St. Paul?

244 A. No, but I got the arrival at St. Paul of the stock.

Q. Have you the departure?

A. I got the time—you see it is taken down to this terminal by the company that takes them out of St. Paul.

I don't keep any record of the departure, no more than I got the report from the yardmaster telling the time it was taken out of the yards—arrived at St. Paul 11:35 A. M. and taken out at 11:45 A. M.—ten minutes, the same date, they were taken out by the Terminal to the feeding place. They arrived at our terminal and at that point they were taken out to the stock yards. That is an additional eight miles. I keep this record myself and make it up from the reports I receive. I consider sixty hours from Bozeman to St. Paul a good stock run. It is an average stock run. As to how often we take a train just livestock through without adding any dead freight to it, I wouldn't say there was no dead freight added to it. I never heard of an instance where they take just livestock and nothing else clear through to St. Paul. The designation "stock run" comes from the fact that there are ten loads or more of stock in the train. We make an extra effort to get them through. It has rights over anything but passenger trains. But with anything less than ten cars we don't; we give them 602's time—that is the fast

eastbound time freight. This one hundred and ten hours  
245 and thirty minutes is actual running time outside of the places where they set out to feed. The actual running time includes the delays of changing crews and engines at terminals—that is counted in in that one hundred and ten hours and thirty minutes.

They left Belgrade, January 2nd at 3:15 P. M. and got to St. Paul at 11:35 A. M. January 10th. That is 187 hours and something—187 hours and twenty minutes.

Q. Counting out your figures for delays for feeding, it makes the run to St. Paul, according to my figures about 115 hours—116 hours.

A. You mean taking out from the time they were actually feeding.

Q. You gave me certain figures for feeding from what the records show?

A. When I gave you those figures first—we weren't talking about

the actual feeding—I was talking about the time they were set out to feed until taken from this place after feeding—that should make a difference of three or four hours. An hour and one-half at one place.

I said one hundred and ten hours outside of all the other delays, and they amount to seventy-one hours and twenty-five minutes. You can assume how long they should have been at a place—

Q. I am not assuming anything—I am taking your figures for it?  
A. That is why I made those figures—I have nothing to state how long they are going to be at this place or that place—  
46 every time they set out I figure they are set out to feed.

There was one hundred and ten hours of actual running me on the way inclusive of delays for engines, sidetracking and everything else. The total time taken was 187 hours and twenty minutes.

Q. And added to that the total time they were feeding and that would take up the rest of the time would it not—seventy-one hours, and that deducted from 187 hours and twenty minutes leaves one hundred and fifteen hours (?)

A. I would have to figure that out to take out what you call the actual feeding time.

#### Redirect examination.

By Mr. HALL:

Q. The difference in your figures is this—when you gave the figures of one hundred and ten hours and thirty minutes—

By Mr. AITKEN: I object to that question as leading.

Q. You give us the figures of one hundred and ten hours and thirty minutes—what was the period that you deducted from each one of those places where you fed—all the time from the time you unloaded from the cars until you loaded back into the cars or the time from which they were cut out of the train to be taken to the yard for unloading until the time they were back to the train after being loaded.

A. I took that time from the time they were set out at the place they were going to feed and started in again when picked up at the place they fed.

247 Q. Now then, if the cattle were not set out of the train for the purpose of being taken to the stock-yards for the purpose of being watered and fed and rested at a particular point what delay would they receive at that point?

A. Well, it is hard to tell—about thirty minutes.

Half an hour is about an average stop—some places more and some less. If not set out for feed they would simply encounter the delay incident to changing engines and such things as that.

Q. It was on that computation in which you figured the time from which they were set out of the train—

By Mr. AITKEN (interrupting): Objected to as leading.

By Mr. HALL: I will withdraw the question.

N. J. ABRAM, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HALL:

My name is N. J. Abram. I live at Chicago, Illinois. I occupy the position of Assistant Superintendent of Transportation C., B. & Q. Railroad. I have looked up the records regarding the movement of four cars of cattle shipped by Mr. R. J. Wall from Belgrade, Montana, to Chicago, in January, 1912.

Q. From your records can you state when that stock was loaded at St. Paul?

248 By Mr. AITKEN: Have you the original records with you Mr. Abram?

A. I have not.

By Mr. AITKEN: What are you testifying from, what have you?

A. The train conductor's statement.

By Mr. AITKEN: Did you copy that yourself?

A. No, I have it verbally from him.

Q. You have the train sheet showing this movement?

A. Yes sir, I have that.

Q. Does that train sheet show when they were loaded?

A. No, sir.

By Mr. AITKEN: We have no objection to the train sheet.

I have a record here from Dayton Bluff to Chicago. That is the point where my road first received the stock.

Q. What time were they received there.

By Mr. AITKEN: Just a minute—who made the record—is this the train sheet record—the original train sheet?

A. Yes, sir.

My record does not show what time these stock were received at Dayton Bluff; they left there at 12 o'clock midnight January 11th.

By Mr. AITKEN: Is that the train sheet you have there?

A. Yes, sir.

249 By Mr. AITKEN: Did you take these figures off the train sheet?

A. I did—yes, sir; just for convenience.

Q. Do you know from what line these stock were received by your company there?

A. Well it's junction railroad at St. Paul—I don't know the name of it.

By Mr. AITKEN: Where is Dayton Bluff?

A. (Continuing:) That is where we got them from transfer company—just out of St. Paul.

The stock arrived at Grand Crossing, which is the next freight division point, at 1:30 P. M. January 12th.

By Mr. AITKEN: When did they leave Dayton Bluff?

A. Twelve o'clock midnight January 11th?

By Mr. AITKEN: Twelve o'clock midnight, January 11th?

A. Yes, sir.

Conductor Hill had charge of them. They lost some time on that

un. According to the schedule they are allowed seven hours and forty-five minutes and they used thirteen hours and thirty-one minutes. The class of freight train that was transporting this stock was a time freight train. On my road a time freight is slower than a stock train. There is no other freight train, other than a stock train, that is faster than that. I can tell you from my train sheet what was the cause of these delays that they failed to make 250 their schedule. I cannot, but Conductor Hill has his delay report with him. From Grand Crossing to Savannah, the next freight division point, they used eight hours and seven hours and forty-five minutes is the schedule. They only lost fifteen minutes on that run. From Savannah to Aurora, the next division point, five hours and fifty-three minutes was used, and the schedule is six hours and fifty-nine minutes. A gain of one hour and six minutes over the schedule. When the stock reached Aurora they set them out on that train and switched at Montgomery, Ill., a feeding station. From Aurora to Montgomery is two miles and eight-tenths. We have very excellent facilities there for feeding, the best on our railroad anywhere. The stock arrived at Aurora at 7:30 A. M. We have no feeding facilities at Aurora. This stock could not have gone on to Chicago that morning because they would have exceeded the 36-hour limit. It is twenty-nine miles from Aurora to Clyde Park. They had one hour and thirty minutes from Aurora before exceeding the 36-hour limit. One hour and thirty minutes is the exact schedule from Aurora to Clyde Park and from Clyde Park to the U. S. yards is eleven and six-tenths miles.

By Mr. AITKEN: Is that your stopping point?

A. That is the end of the freight line.

By Mr. AITKEN: How far is it?

A. Twenty-nine miles.

It is eleven and six-tenths miles from Clyde Park to the 251 U. S. stockyards. We consider ourselves very fortunate if we make it in three hours. The delay is due to the fact that we use our own rails from Clyde to the Western Avenue, at which point we go onto joint tracks used by practically all railroads from there to the stockyards and it is always more or less congested.

Q. Could you make any approximate estimate of the number of trains that go in over this joint track every day?

By Mr. AITKEN: That is immaterial—we are not disputing this three hours.

The schedule run of this fast freight, time freight, from Dayton Bluffs to Clyde Park is twenty-eight hours and thirty minutes. It is a regular schedule train on our time sheet.

As to whether I deducted from this the amount of time that the stock were at Montgomery, I don't know whether you mean the time freight train schedule or the time they actually made.

Q. The time they actually made—what I want is this—deduct from the actual running time of this train or deduct rather from the time it took to run from St. Paul to Chicago, the time consumed by the cars being set out at Aurora, time taken going to the feeding

yards, and until received back into Aurora to go on into Chicago—in other words deduct from that time the period consumed in feeding and resting this stock and going to and from the feed yards?

252 A. As far as the actual schedule is concerned you only ask me to quote the schedule as far as Aurora?

Q. I guess that is right—what would you say the actual running time was as compared with your schedule from Aurora into Chicago, into Clyde.

A. The train used one hour and forty-five minutes—the schedule running time is one hour and thirty minutes.

Q. Was that the train that—out of which this stock—from which these stock were set out at Aurora?

A. No, sir.

That was the train that took them in. I know what time the train took in going from Aurora to Chicago from which these stock were set out on the 13th. That train arrived at Aurora 11:59 January 12th, and left there 12:45 A. M. January 13th—I am giving you the wrong figures—excuse me—that train arrived at Aurora 7:30 A. M., January 13th—I have it here somewhere.

By Mr. AITKEN (interrupting): Are you reading from the train sheet now?

A. No, sir; but from information I got from the train sheet.

By Mr. AITKEN: Did you get it yourself?

A. Yes, sir. At least I thought I had it here—I may not have that train sheet—I haven't got the train sheet showing the balance of that run because the stock were set out there and I only have that covering the stock.

253 The total time consumed in the run from Dayton Bluffs to Aurora and from Aurora to Clyde was twenty-three hours and fifteen minutes.

Q. I believe that is wrong—from the time they left Dayton Bluffs until reached Aurora and from Aurora to Chicago?

A. That is right—I am wrong—thirty-three hours and fifteen minutes.

The regular schedule was twenty-eight hours and thirty minutes.

Q. What have you to say as to whether it would have been possible to have gotten this stock to any cattle market in Chicago earlier than the market they did arrive at on Monday the 15th after you received them at St. Paul?

A. There is no Saturday market.

If the stock had been taken on into Chicago on the morning of the 13th Monday, January 15th, would have been the first market they could have been sold on. As to our facilities for feeding and resting stock at Montgomery as compared to that at Chicago, it is generally conceded by everybody that there is no better feeding facilities anywhere than we have at Montgomery.

#### Cross-examination:

By Mr. AITKEN: There is practically no Saturday market. They sell nothing, but a very few cattle at the Union Stock Yards on Saturday.

Q. You mean it is not as active on Saturday as other days?

254 A. Not by any means.

Q. Still there is some market?

By Mr. HALL: Your witness said himself there was practically none.

By Mr. AITKEN: He said there is practically none.

By Mr. HALL: That is what he said.

By Mr. AITKEN: No, he said there was no market.

As to the condition of the weather when the train made the run from Dayton Bluffs to Aurora, I believe it was the coldest night in my twenty years' experience with the Burlington Railroad. I was not with the train. I recall that night very well.

Q. You came within four hours and forty-five minutes of making your schedule?

A. I haven't figured it—if that is right—all right.

Q. You said your schedule was twenty-eight hours and thirty minutes and you made it in thirty-three hours and fifteen minutes?

A. The extreme cold weather was on certain portions of the road.

From Savannah to Aurora is the part of the road where we lost only fifteen minutes on the run. That was on January 12th. It was not so cold as the night of the eleventh. I would have to refer to our reports to tell whether it was below zero or not. Referring to this report, which is not official, and which is as of 7 A. M., 255 it shows on Aurora division, which covers part of the line from Savannah to Aurora, as thirteen below zero. On one place on one run we lost fifteen minutes and on another run we gained. We lost fifteen minutes on the run from Grand Crossing to Savannah. That was on January 12th. And from Savannah to Aurora we gained one hour and six minutes, when the mercury was thirteen below zero at 7 o'clock A. M. The train sheets that I had didn't show the delays, but I would have to look at the others before I could tell.

By Mr. HALL: Have you the train sheets there of the 13th?

A. Covering what portion of the road—I have all the train sheets except—

By Mr. HALL (interrupting): The 13th would be the date you got into Aurora?

A. Yes, sir.

Q. Well, what I want to find out without going to that trouble is do you get general reports of delays on your train sheets?

A. Yes, but sometimes they are so numerous that the train sheets can't hold them.

I know that the cars were not held at Aurora from 11 o'clock at night until about 3 o'clock in the morning—sidetracked. I know that from the record. Because the record shows the movement of the cars. They were in the U. S. Yards before that. They were at the U. S. Yards before 2 o'clock. My record does not show and delay at Aurora, but I can tell you what the practice is.

256 I don't know when they got into Aurora from Montgomery.

Q. As a matter of fact didn't they get into Aurora about 5 o'clock?

A. I don't know.

Q. You don't know either that they didn't get out nearly 11 o'clock.

A. I know they did.

They got out at 8:47 P. M. January 14th. That is what was reported to me. I was not there myself to see. From St. Paul to Chicago by the route these cattle took is 443.1 miles.

Redirect examination.

By Mr. HALL:

Q. From your train sheets of the thirteenth can you tell whether any other trains lost materially or were annulled or anything—I will refer you to passenger train No. 50 which corresponds to No. 4 of the Northern Pacific?

A. What date are you referring to?

Q. The thirteenth I think is what it is. Did your train sheet of January 11th cover that?

A. Portion of the road from St. Paul to Grand Crossing—it shows there was no No. 50 on the line indicating that it was annulled.

My train sheet of January 13th covering that portion of the road from Savannah to Aurora shows that the train was annulled from Savannah to Aurora. I have that train sheet showing that. That

was passenger train No. 50, which is Northern Pacific No. 4.

257 We have a single track most of the way along there, but we are building a double track on the La Crosse division—I think we have about seventy-five or one hundred miles completed. It is a single track most of the way now.

Q. Can you explain how it is, in extremely cold weather, certain trains are so late and others are practically on schedule?

A. Of course conditions govern—the conductors can give you a better idea of that than I can.

C. J. HILL, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HARTMAN:

My name is C. J. Hill. I reside at La Crosse, Wisconsin. My business is freight conductor on the Chicago, Burlington & Quincy. I have been so engaged for three years. I was engaged in the discharge of my duties as such conductor in January, 1912. I remember of handling four cars of cattle, shipped from Belgrade, Montana, to Chicago on the eleventh or twelfth of January, 1912. I first took charge of them at Dayton Bluffs. That is about a mile from St. Paul, it is our terminal. My road receives freight and so forth at Dayton Bluffs from what we call the Terminal Railroad Company. I couldn't say what time this stock reached there from the terminal. As to what time I took charge of it as their conductor, I was ordered for ten fifteen and got out at twelve o'clock mid-

258 night—the train was made up and I had to wait fifty-five minutes for another train. When I say "Ordered at ten fif-

"een" I mean by that, that that is the time we were supposed to go, but we didn't leave until twelve o'clock midnight. There was fifty-five minutes' delay for the train and fifty minutes for air. The air was froze up. The weather was very cold—I don't know just how cold it was but it was very severe. I finally got off at twelve o'clock midnight. I hauled these cattle to La Crosse, Wisconsin. I got to La Crosse at 1:30 P. M.

Q. One hour and one-half after starting?

A. No, sir, this was twelve o'clock midnight until 1:30 P. M.

La Crosse and Grand Crossing are the same thing. That is in Wisconsin. I left at midnight on the twelfth and got to Grand Crossing at 1:30 P. M. the 12th. That run is 128 miles. That was thirteen and one half hours' run. I had some delays and have them here in my delay report.

By Mr. AITKEN: Did you make that report yourself?

A. Yes, sir.

By Mr. AITKEN: At the time?

A. Every trip we have to make out one of these?

By Mr. AITKEN: Is that the one you made at that time?

A. Yes, sir.

By Mr. AITKEN: All right.

Well I was out twelve miles and had to stop and fix the 259 air and I had a hot box—and another thirty minutes, because the engine was not steaming and that made seventy-five minutes. As to how I account for the engine not steaming, we went on to Prescott—he said he couldn't make steam, but we still used that engine and another engine additional—so out of there we had two engines—we made good time after we got out of there—but at Prescott I had two hours—or rather four hours and twenty minutes' delay—delay for the other engine, and water and meeting an extra. That was at Prescott. I met train extra 1919 there. It did not have the right of way over me, but on account of our delay there I would have had three or four meets if I went on—if I had gone on schedule time I would have met him twenty miles below but they changed the meet from time to time—the delay was only a few minutes—they were there about the time I was ready to go. At Hager I had a hot box—forty minutes—at Bay City—

By Mr. AITKEN: What was the delay at Hager for?

A forty minutes—hot box—putting in brass at Bay City, had seventy-five minutes' delay taking water for two engines twenty minutes and letting No. 54—a passenger train—by, was another thirty minutes and twenty-five minutes for the hot box there. At Maiden Rock I met two first class passenger trains—47 and 57—that was fifty minutes.

At Pepin I was twenty minutes taking coal. At Alma I 260 was forty minutes meeting No. 91—that is a local freight, and No. 49 a passenger train. East Winona ten minutes meeting extra 2111. I had three hot boxes on one car—it was a car of meat I couldn't set out—it was perishable. I account for those delays from hot boxes at this time, I suppose it was the intense cold weather—they wouldn't lubricate—they will heat up before they will lubricate.

Q. As I understand you—I understand from your first statement that you don't know how long the cattle had been standing where you took charge of them at Dayton's Bluff when you started out?

A. Their yard is right side of ours, and the stock is brought up to that yard and our switch engines goes over and gets them and brings them over as soon as they arrive.

I got the cars of stock as soon as they arrived. Went over and got them as soon as they came up, because the yards are right side by side, right close, right across the main line.

Cross-examination by Mr. AITKEN:

My train was a regular train, time freight. The schedule time for my train from Dayton's Bluff to Grand Crossing is seven hours and forty-five minutes, and I was thirteen hours and thirty minutes making the run.

Q. Then when Mr. Abram testified you only lost fifteen minutes on that run he was mistaken?

By Mr. HALL: He didn't testify to that.

261 By Mr. AITKEN: He certainly did.

A. There are three divisions.

By Mr. HALL: He said he lost it on the next run to the first one.

By Mr. AITKEN: It was the first run according to my notes that he said he only lost fifteen minutes.

By Mr. HALL: We are not responsible for your notes.

By Mr. AITKEN: No, nor am I responsible for yours.

Q. What was your running time?

A. The schedule time of that train is seven hours and forty-five minutes.

I was thirteen hours and thirty minutes making the run. Part of the time the engine was bad—most of it. At Prescott I had a delay of ten minutes after water, twenty minutes waiting for extra and the rest of the time to get engine. They didn't have an engine at Prescott and had to send to Dayton's Bluff, nineteen miles for an engine. That is not a division point, it is nineteen miles out of Dayton's Bluff. The weather was very cold—while waiting at Prescott there according to the thermometer there it was forty-four below.

E. D. HUMPHREY: A witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HARTMAN:

262 My name is E. D. Humphrey. I reside at La Crosse, Wisconsin. My business is freight conductor for the C., B. & Q. I was working there as freight conductor on January, 1912. We ran over two divisions from Dayton's Bluff to Savannah, but on this run I was running between Grand Crossing and Savannah, Ill.

By Mr. AITKEN: This Grand Crossing—that is the same as La Crosse?

A. Yes, sir.

The length of that run from Grand Crossing to Savannah is 156 miles. I remember upon the occasion of that run of handling four cars of cattle shipped from Belgrade, Montana, to Chicago. I first took charge of them at Grand Crossing. I was eight hours making the run from Grand Crossing to Savannah. I left Grand Crossing at 3:10 P. M. January 12th and arrived in Savannah at 11:10 the same date. We lost fifteen minutes from the schedule time in making that run. We got there in eight hours and the schedule time is seven hours and forty-five minutes. I had no delays to speak of. I had no trouble with the cattle and there was no complaint made by anybody. As to whether there was anything done with the cattle after I got there, there was one cow that was in bad shape—I discovered that when we pulled in and I notified the stockmen and between us we pinned it up in one end of the car.

That was for the purpose of protecting it. The weather was  
263 very cold upon this run. The weather has some effect upon the running of trains. It freezes the train up if you have any extraordinary delays—that is to amount to anything—say twenty or thirty minutes or over—it stiffens up the train and it is harder to handle. I explain my coming within fifteen minutes of the schedule run by the fact that I had no delays to stiffen up my train. I can tell you from my delay reports the stops I made along the various stopping places between the two points. My first delay was De Soto, ten minutes for water. That is just the length of time we were there. The next delay was fifteen minutes at Verchere for water and waiting for stock men. The stockman was looking over the cattle. And the next was fifteen minutes for orders at Crawford and the next was ten minutes at Bagley meeting first class train, and the next was twelve minutes at Cassville for coal and the next was McCartney, ten minutes for water and the next was five minutes at Potosi waiting for No. 81—freight train; the next was East Dubuque fifteen minutes for block—Galena Junction ten minutes for water—that is all of my delays. My longest stop was fifteen minutes, and I only had two of them.

No cross examination.

C. R. HAMY, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HARTMAN:

264 My name is C. R. Hamy. I reside at Aurora, Ill. My business is conductor on the C., B. & Q. Railroad. I have been employed by that company for twenty-three years. I was serving it in the capacity of conductor in January, 1912. My run was between Savannah and Chicago. I recall the occasion of hauling four cars of cattle shipped from Belgrade, Montana, to Chicago along in the early part of January, 1912. I took hold of them at

Savannah, Ill., and left them at Aurora, Ill. I left Savannah at 1:37 A. M. January 13, 1912, and got to Aurora 7:30 A. M. the same date. The distance from Savannah to Aurora is 106 miles. The only delays I had on the trip were for coal and water and meeting first class trains, that is all. I do not know the length of the delays I had, but they were not unusual. We ran as an extra train and didn't have any schedule time. As to how the time of my train compared with the freight that had a schedule, I beat their time by—the time freight schedule is seven hours—I made it in five hours and fifty some minutes by running extra. The reason I left the stock at Aurora was because we couldn't make Chicago under the thirty-six hour release. After leaving it there I went on to Chicago. I don't know what became of it. It was left in charge of the yard master. There was no complaint to me about it before I left there.

Cross-examination by Mr. AITKEN:

265      The weather was ten or twelve below leaving Savannah. I made a little better than seventeen miles per hour on that run.

D. H. CRATTY, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HARTMAN:

My name is D. H. Cratty. I live at Galesburg, Ill. My business is conductor on the Burlington railroad. I was such conductor in January, 1912. I had been serving the company in that capacity at that time about ten years, in the neighborhood of ten years. According to my wheel report—I don't remember from memory—I was running on what is known as the Aurora division between Galesburg and Chicago. I don't remember handling four cars of stock out of Aurora into Chicago that had been shipped from Belgrade, Montana. I have a memorandum, which I made myself, but I have not my delay report. According to this memorandum I arrived at Aurora 7:45 P. M. on the fourteenth of January, and departed from Aurora yard at 8:30 P. M. There would be a little discrepancy there with the train sheet due to the fact that I ordinarily and usually begin the time when the train starts in the yards, but the time when the operator—his station is about one-half to three-quarters of a mile east—would be a little later; I tell you this to explain any discrepancy that I would give on my delay and would be found on his report. My record shows that I 266      picked these four cars of cattle up at Aurora. I am unable to state whether I picked them up with my engine or whether they were put on with a switch engine—possibly with my engine though. I have no record as to where they came from. I really don't know as to whether they had been fed or not, but the presumption I would take from being ready to — is that they had been fed and were ready to go forward. I left the yard at 8:40; that is my record on it. My memorandum shows that I arrived at

Clyde 10:30 P. M. You will note a discrepancy of one minute from the record I took and the record on the train sheet taken at the tower because it is taken as to what time the engine passes the tower and I took it when I passed the tower—in the caboose. My record shows that I got to Clyde at 10:30 P. M. As to what I done with the cattle when I got to Clyde, I would take from my record that I left them at the Hawthorn yard which is Clyde is the gateway to the Hawthorn Yard. The Hawthorn yard is connected with the C., B. & Q. I don't know what became of the cattle after leaving them at 10:40. My record shows I was relieved. The distance from Aurora to Clyde is 29 miles. I had no unusual delays, but I had some delays. My delays were at Fola—the first station east of Aurora about four miles' distance—five minutes for orders—I would take it from that that the dispatcher had detoured our train to the north track to save delays—we got no orders 267 unless we move against the current or against the traffic. I was delayed there for five minutes, and at Congress Park, fifteen minutes to set out cars. In looking over the wheel report I figure I had forty-eight cars besides the four cars of cattle. The next time was at Hawthorn. I was relieved from the train at 10:55—that means the time that I got my way car put away after leaving the train. The run was a good one; there was no complaint. I left the cattle at the terminal yard there. The Hawthorn yard is seven miles from the U. S. Wye—the Hawthorn yard proper. As to what I know about the length of time it ordinarily takes to get stock from that point to the unloading point in the stock yards at Chicago, the movements are very uncertain ones—I ordinarily on our own tracks—we use our own track to the Junction of the Pen (?) line—and we use the Chicago Junction line also—over our own tracks up to the time we arrive at the pen is usually one hour—you can estimate the delay on our own track better than you can on the other roads due to the congestion of the other tracks—on account of several railroads moving over the other tracks.

Q. You have the cars there at Hawthorn yard and by what agency would they be taken over to the unloading point in the stock yards?

A. Ordinarily they are taken over by the yard transfer engine or by some other train that is following up close—the yard master determines that.

268 By Mr. AITKEN: We are making no point in that.

Cross-examination by Mr. AITKEN:

We had eleven cars of sheep and four cars of cattle on the train, shown up at Aurora. You can see my book to see the way I have my record, but I don't know whether you can distinguish it or not—I use station numbers to distinguish the town. I kept this at the time.

Defendant Rests.

By the COURT: Let the record show at this time that the Court states to the plaintiff that if he has any evidence to offer in rebuttal whereby he can show that the contract relied upon by the

defense in this case was not based upon a consideration or was in fact not based upon the reduction of values—or in fact if the rate charged was not based upon the reduction of values as stated in the contract he will be permitted to show it.

*Rebuttal Testimony.*

R. J. WALL, a witness in his own behalf, being called in rebuttal, testified as follows:

Direct examination by Mr. AITKEN:

Q. Mr. Wall how did you come to ship these cattle when the weather was so cold?

A. Well expecting that—

By Mr. HALL: We object—that was all gone into in the case in chief.

269 By the COURT: Yes, that was gone into—he told the circumstances why he shipped them at that time.

By Mr. AITKEN: The purpose of this is to show that he relied upon the statement.

By Mr. HALL: We object on the further ground that the counsel is attempting to introduce testimony at this time for the purpose of showing that the railroad company should have notified him that there was cold weather along the line—and there is no allegation in the complaint of that kind.

By Mr. AITKEN: That isn't the purpose—it was to show that Mr. Wall relied on the statement that there was a stock train at Billings that was to pick him up.

By the COURT: That was gone into.

By Mr. AITKEN: It is understood he so testified.

By the COURT: I don't know whether he did but I think the others did.

By Mr. AITKEN: I don't think there is any testimony in the record by Mr. Wall that if such representations had never been made to them or that if such representations had not been made to them he would not have shipped the stock.

By Mr. HALL: It is too late to put it in now—it is a part of his case in chief.

By Mr. AITKEN: Your own agent down there admitted he made such representations under the instructions of the superintendent.

270 By Mr. HALL: He did not admit—he admitted that he told him that his information was there was going to be some sheep shipped from Bridger and that if he got his cattle off on the second he could join them at Billings and get 602

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By Mr. AITKEN: No, join them at Billings and get special stock train.

By the COURT: I don't think it is proper rebuttal but it won't do any harm to ask the question—I will let him ask the question—if you insist upon the question I will let him answer; to which ruling of the court the defendant duly excepts.

A. (First part of answer read—continuing:) expecting that I would run into that stock train at Billings.

If I had not expected to get a stock train at Billings I would not have shipped at that time.

Q. Now, Mr. Wall, you heard the testimony of these various railroad employes as to the number of fat cattle weighing from 1300 to 1400 pounds that can be shipped in the average thirty-six foot stock cars—standard car, such as you had on this trip.

A. We don't claim we had fourteen hundred pound cattle—cows and steers—we don't claim that we had 1400-pound cattle on an average—cows and steers mixed up altogether.

As to how many steers I ever shipped in thirty-six foot cars, I never shipped them in—I never separated them—I figure on shipping twenty-five fat cattle in a thirty-six foot car. The year 271 of the strike—the switchman's strike they had a load of the same grade of cattle but not as heavy cattle—they have loaded in a mistake as high as 27. We didn't mean to load them, but in a mistake they did load them of the same grade of cattle but not as heavy cattle. The same age and everything.

Cross-examination by Mr. HALL:

As to whether I claim that my steers that I had there averaged 1400 pounds, that is my estimation; that they would average 1400 pounds at the time that they loaded them in Belgrade. I don't know that my cows would average 1350, I said they would average about 1300 pounds, myself. I said that I can put into a standard car twenty-five head of steers averaging 1400 and cows averaging 1300, where they are mixed together.

HARVEY BIGGS, a witness called and sworn on behalf of the plaintiff, testified as follows:

Cross-examination by Mr. AITKEN:

I reside at Pass Creek, Gallatin County. Pass Creek is north of Belgrade. My occupation is farmer and stock raising. I have been engaged in the business of stock raising about fifteen years. As a stock raiser I have shipped beef to Chicago. I shipped from Pass Creek—from Belgrade station. Twice I think is all I ever shipped. I shipped steers the first time. The steers averaged in weight at Belgrade 1300, I guess—probably more—quite big steers.

272 Q. What did they weigh when they got to Chicago.

By Mr. HARTMAN: We object if the court please—it is immaterial in the first instance and in the next place it is part of their case in chief.

By Mr. AITKEN: It is for the purpose of rebutting their testimony as to the number of cattle put in a standard car.

By Mr. HALL: We object on the further ground that if his stock were weighed in Chicago the records are the best evidence.

By the COURT: I think Mr. Biggs is competent to testify from his experience as a shipper. Overruled to which ruling of the Court the defendant duly excepts.

By Mr. AITKEN: We will withdraw that question as to what they weighed at Chicago; now how many of those steers did you load in a stock car at that time?

A. I had twenty-four that trip. All steers.

I next shipped in 1910. At that time I shipped one car of cows and three cars of steers. My steers at Belgrade would average about 1300. I had twenty-six in one car at that time. They done it through a mistake at Belgrade—we got twenty-six in the car at Belgrade and then we carried them on through. There was no injury to them by reason of having loaded twenty-six in one car.

Cross-examination by Mr. HALL:

I don't just remember what time of the year it was when  
273 I made these shipments. It was along in the latter part of the fall—just before Christmas in December sometime. These were fat stock—three-year-olds. They were just grass fed cattle. They were in good shape. They were a mixed bunch, mostly short-horn stock.

CHARLES HANSON, a witness for the plaintiff, called in rebuttal, testified as follows:

Direct examination by Mr. AITKEN:

Q. Calling your attention to defendant's exhibit No. 2 on cross examination, did you hear the testimony of Mr. Johnson as to your dictation of that letter?

A. Well, I don't exactly—

By Mr. HALL: We object to that—you went into the details of the way that letter was written in your examination in chief.

By the COURT: I understood the witness to testify that the agent wrote it out and he signed it.

By Mr. AITKEN: Yes, but Mr. Johnson said that he dictated it.

By the COURT: Answer the question. To which ruling of the Court the defendant duly excepts.

A. I didn't dictate it.

I did not tell him what to write. I just signed the letter after he wrote it—he asked me a few questions of what kind of a run 274 we had and I told him how it was—and he marked it down and I signed it.

Cross-examination by Mr. HALL:

I had a conversation with him explaining the cow's death and he wrote that letter and I signed it.

Plaintiff rests.

Defendant rests.

By Mr. HALL: At this time if the Court please we ask you for an order directing a verdict in favor of the defendant on the grounds heretofore set out in our motion for a non-suit at the close of the plaintiff's case in chief and also upon the additional grounds that

the undisputed testimony in this case shows that the stock were shipped pursuant to our livestock contract which is valid and binding upon the plaintiff and that one of the terms of such contract provides that as a condition precedent to the shipper's right "to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock." The evidence shows and the fact is admitted by the pleadings that no such notice was given as required by the contract and the evidence does not show any waiver of such notice by the defendant.

By the COURT: I think under the circumstances here the  
275 case should be submitted to the jury under proper instructions and let the Supreme Court make a final decision on it in case they desire to appeal—I wouldn't take the case away from the jury under the circumstances that exist. The rule is it may be taken from the conduct of the company or the conduct of the party against whom damages are sought, and in this case there could be nothing more than an implied waiver and the defendant was not put in any worse position by anything that the plaintiff has done so far as the evidence shows—I don't think I would be justified in instructing the jury as a matter of fact there was no waiver—I will overrule the motion and give the defendants an exception.

The foregoing including the exhibits at the end of this bill, is all of the evidence introduced in said case.

#### *Settlement of Instructions.*

Defendant's offered instruction No. 1 given by the Court as instruction No. 4, reads as follows:

You are instructed that under the pleadings in this case, the burden is on the plaintiff to prove by a preponderance of the evidence that the damage, if any, to said stock was caused by the negligence of the defendant or of the connecting carrier, and unless the plaintiff has so proven such negligence your verdict should be for the defendant.

By Mr. AITKEN: The plaintiff objects and excepts to the giving  
276 of instruction No. 4, given by the Court, upon the ground that such instruction is contrary to law in that it places the burden of proving negligence upon the part of the defendant upon the plaintiff by a preponderance of the evidence and is in direct conflict with instruction No. 24 as given by the Court.

By the COURT: Overruled; to which ruling of the Court the plaintiff duly excepts.

Defendant's offered instruction No. 7, given by the Court as instruction No. 10, reads as follows:

If you find from the evidence that there were unusual delays in the transportation of these stock, you are instructed that the mere proof of that fact alone is not proof of negligence and would not entitle plaintiff to a verdict.

By Mr. AITKEN: The plaintiff objects and excepts to the giving

of instruction No. 10 by the Court for the reason and upon the ground that it is contrary to law in this—that mere proof of delays in the transportation of the live stock in question is *prima facie* evidence of negligence on the part of the defendant.

By the COURT: Overruled.

To which ruling of the Court the plaintiff duly excepts.

Defendant's offered instruction No. 10, given by the Court as instruction No. 13, reads as follows:

You are instructed that under the terms of the contract under which these stock were shipped, the defendant did not undertake to transport the stock within any particular time, but only with reasonable dispatch.

Therefore plaintiff cannot recover damages, if any, for the failure of the defendant or connecting carrier to arrive at point of destination at a particular time, but can recover damages on such grounds only by proving by a preponderance of the evidence that the defendant or connecting carrier by want of ordinary care and diligence failed to reach point of destination within a reasonable time, when considered in connection with all of the facts and circumstances disclosed by the evidence in this case.

By Mr. AITKEN: The plaintiff objects and excepts to the Court's instruction No. 13 upon the ground and for the reason that the same places upon the plaintiff the burden of proving negligence on the part of the defendant by a preponderance of the evidence and is in direct conflict with the Court's instructions numbered 1 and 24.

By the COURT: Overruled; to which ruling of the Court the plaintiff duly excepts.

Defendant's offered instruction No. 14, given by the Court as instruction No. 17, reads as follows:

You are further instructed that it is immaterial in the determination of this case whether or not the contract of shipment was signed by the plaintiff and received by him prior to the loading of the stock into the cars at Belgrade, or subsequent thereto, for the contract itself provides that it is to be controlling between the parties as to said shipment without regard to whether the transportation of the stock shipped had already been commenced or undertaken by the company at the time of the execution of the same.

By Mr. AITKEN: The plaintiff objects and excepts to the Court's instruction No. 17 upon the ground that it fails to inform the jury that unless the said special contract was made and entered into upon sufficient consideration, after the livestock had been received by the carrier, it is void and not binding upon the plaintiff.

By the COURT: Overruled.

To which ruling of the Court the plaintiff duly excepts.

Defendant's offered instruction No. 17, given by the Court as instruction No. 20, reads as follows:

You are instructed that one of the defenses relied upon by the defendant is that no notice of claim for damages for loss or injury to the stock in question was given by the plaintiff to the defendant or to the connecting carrier, before the stock were removed from the place of destination or mingled with other stock. This provision

of said contract is a reasonable one, binding upon the plaintiff, and under the admissions in his reply, prevents him from recovering in this action, unless you find that after notice of said claim was given to defendant on January 26th, 1912, defendant expressly or impliedly by its conduct waived the giving of said notice in accordance with this provision of the contract.

279 By Mr. AITKEN: The plaintiff objects and excepts to the Court's giving instruction No. 20 upon the ground that the said instruction assumes as a matter of law that said special contract and all its provisions are reasonable, when as a matter of law, the question as to whether or not the provisions of the said special contract are reasonable is a question exclusive for the determination of the jury:

By the COURT: Overruled.

To which ruling of the Court the plaintiff duly excepts.

Plaintiff's offered instruction No. 7, given by the Court as instruction No. 21, reads as follows:

The Court instructs the jury that a stipulation in a special contract of carriage by a common carrier, limiting the liability of the carrier or fixing the time and manner of giving notice or presenting claims may be waived by the carrier impliedly, by conduct, as well as expressly. Thus where a claim is received and acted upon, after the expiration of the time limited without any objection on that account, the carrier may be deemed to have waived the benefit of the limitation as to the time of presenting it, but the question of whether or not the carrier has waived such condition in the contract in this case is a question for you to determine from all the evidence in the case.

280 By Mr. HARTMAN: The defendant objects and excepts to the giving of instruction No. 21, being plaintiff's offered instruction No. 7, as modified by the court, upon the ground that the same is in conflict with instruction No. 19, being instruction No. 16 offered by the defendant and upon the further ground that said instruction is misleading and does not state the law in that it fails to take into account the question as to whether or not the plaintiff was put in any worse position by the action of the defendant or its agents constituting waiver by conduct mentioned in the instruction.

By the COURT: Overruled.

To which ruling of the Court the defendant duly excepts, and objects to the giving of said instruction for the reasons assigned in the objection thereto.

Plaintiff's offered instruction No. 4, given by the Court as instruction No. 23, reads as follows:

The jury are instructed that the carrier of livestock for pay must exercise reasonable diligence in the business, and complete the journey within a reasonable time, and if he does not do so, and the stock is injured by the delay, the carrier will be liable to the owner for all damages caused by such delay. What would be an unreasonable delay in forwarding and transporting said cattle, or what would be a reasonable time within which said cattle should have been transported, are purely questions of fact for your exclusive de-

termination from all the facts and circumstances in evidence before you.

By Mr. HARTMAN: The defendant objects to the giving  
281 of instruction No. 4 asked for by the plaintiff, upon the grounds and for the reasons that the same is in conflict with instruction No. 4, given by the Court, and is also in conflict with instruction No. 10, given by the Court, and upon the further ground that it put the burden of proving that there was no negligence—that the injuries or damage to the stock shipped was not caused by negligence—putting it upon the defendant.

By the COURT: Overruled.

The defendant then and there excepts to the giving of said instruction No. 23 for the reasons—for the same reasons and upon the same grounds assigned in its objection to the same.

Plaintiff's offered instruction No. 2, given by the Court as instruction No. 24, reads as follows:

The Court instructs the jury that if they find from the evidence in the case that the cattle described in the complaint, or any of them, died or were injured while in the custody and care of the defendant, and such death or injury was not the result of some inherent want of vitality, or of injuries inflicted by such cattle upon each other, or by unavoidable accident, the defendant will be liable; unless it is established by a preponderance of the evidence that such death or injury was occasioned by some other cause than the negligence of the defendant and in the absence of such proof the law will presume negligence on the part of the defendant.

By Mr. HARTMAN: The defendant objects to the giving of  
282 instruction No. 24, being instruction No. 2 asked for by the plaintiff, upon the grounds and for the reason that the same is in conflict with instruction No. 4 given by the Court, and instruction No. 13 given by the Court, and upon the further grounds that it is contrary to the law that it instructs the jury that where the plaintiff has shown delivery of the stock in question in good condition to the defendant and that it was received in bad condition at the point of destination, that such evidence constitutes evidence of negligence whereas the law is that the plaintiff cannot recover unless it shows by a preponderance of evidence that the alleged injury and damage to the stock was caused by the negligence of the defendant or connecting carrier.

By the COURT: Overruled.

To which ruling of the Court the defendant then and there excepts to the giving of said instruction No. 24 on the same grounds and upon the same reasons as assigned in the reasons for objecting to the same.

Thereupon, after having passed upon and settled the instructions, and before argument of counsel to the jury, the Court charged the jury, in writing, giving them such instructions as were passed upon and settled, and which were the following and none other:

*Instructions Given by the Court.**Instruction No. 1.**Opposite Testimony.*

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(Title of Court and Cause.)

The Court instructs the jury, as a matter of law, that where two witnesses testify directly opposite to each other on a material point, and are the only ones that testify directly to the same point, you are not bound to consider the evidence evenly balanced, or the point not proved; you may regard all the surrounding facts and circumstances proved on the trial and give credence to one witness over the other if you think such facts and circumstances warrant it.

Given:

BEN B. LAW,  
*District Judge.**Instruction No. 2.**Credibility.*

The Court instructs the jury that they are the sole judges — the credibility of all the witnesses who have testified in this case and of the weight to be given to their testimony; and in determining the weight to be given to the testimony of any witness the jury have the right to consider the appearance of each witness on the stand, his manner of testifying, his apparent candor or lack of candor, his apparent fairness or lack of fairness, his apparent intelligence or lack of intelligence, together with all the other circumstances appearing in evidence on the trial.

Given:

BEN B. LAW,  
*District Judge.*

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*Instruction No. 3.**Witness credibility.*

If you find that any witness has testified wilfully and deliberately falsely as to any material fact in this case, you are at liberty to disregard his entire testimony, except in so far as his testimony has been corroborated by the statements of other credible witnesses who have been sworn in the cause, or by facts and circumstances admitted or proven on this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony and by his motives, or by contradictory evidence, and the jury are the judges of his credibility.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 4.*

You are instructed that under the pleadings in this case, the burden is on the plaintiff to prove by a preponderance of the evidence that the damage, if any, to said stock was caused by the negligence of the defendant or of the connecting carrier, and unless the plaintiff has so proven such negligence your verdict should be for the defendant.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 5.*

You are instructed that you can award no damages to the plaintiff in this case, however negligent you may find the defendant company or the connecting carrier were in handling said stock, unless you find that such negligence was the proximate cause of the loss, if any, sustained by the plaintiff, as alleged in the complaint, and then you may award damages only to the extent that such loss, if any, was caused by such negligence.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 6.*

You are instructed that the plaintiff can recover nothing for so much, if any, of the damage, if any, to his stock, as may have been caused by the inherent vice of said stock, or by their natural character and condition, or by treatment to which they had been subjected before being loaded, or on account of being overloaded, if they were overloaded, or by the usual and ordinary course of their transportation by rail without negligence on the part of the railroad company or connecting carrier; and in making up your verdict you will allow plaintiff nothing for any damage which you may believe, from the evidence, was caused by the inherent vice of said stock, or by their natural character and condition, or by the treatment to which they had been subjected before being loaded, or on account of being overloaded, if you find that they were overloaded, or by the usual and ordinary course of their transportation by rail, without negligence on the part of the defendant or connecting carrier.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 7.*

You are instructed that the defendant had the right to unload stock for feed and rest against the wish of the shipper, in the event that carrying the stock to the next suitable place for feeding would

cause them to be confined in the cars for such a period of time as would violate the twenty-eight hour law or the thirty-six hour period, if you find that a thirty-six hour permit had been given.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 8.*

If you find from the evidence that the stock were confined for a period longer than thirty-six consecutive hours, exclusive of the time consumed in loading and unloading, without unloading the same for rest, water and feeding, such act on the part of the defendant or connecting carrier would constitute negligence, unless you further find from the evidence that the defendant was prevented from unloading for rest, feed and water by reason of storms or other accidental or unavoidable causes which could not have been anticipated or avoided by the exercise of due diligence and foresight, in which event, such failure to unload within such period would not  
287 constitute negligence.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 9.*

You are instructed that under the terms of the special contract under which these stock were delivered by the plaintiff to, and accepted by, defendant for carriage to Chicago, the defendant is not liable for the loss, or death, or injury, to such stock, if you find there was any loss, death or injury, unless the same was caused by the negligence of the defendant or the connecting carrier.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 10.*

If you find from the evidence that there were unusual delays in the transportation of these stock, you are instructed that the mere proof of that fact alone is not proof of negligence and would not entitle plaintiff to a verdict.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 11.*

You are instructed that the defendant is liable for damages arising from delay only when such delay is caused by its want of ordinary care and diligence.

If you believe from the evidence that the delays complained of in this case, or which occurred, were delays incident to ordinary 288 transportation by rail over the route, and for the distance these stock were carried, where the number of cars of stock constituted less than a stock run and under the weather condition disclosed by the evidence, and such delays as could not have been prevented by ordinary care and reasonable diligence on the part of the defendant and the connecting carrier in such transportation, then the plaintiff cannot recover for damages, if any, you may find was caused by such delays.

In other words, the plaintiff can recover damages only for such delays as you find were caused by want of ordinary care and diligence on the part of the defendant or connecting carrier.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 12.*

You are instructed that under the terms of the contract under which these stock were shipped the plaintiff cannot recover for damages, if any arising from delays or other causes, if any, which you may find from the evidence were due to the inclemency of the weather and the action of the elements, and not due to any negligence of the defendant or connecting carrier.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 13.*

You are instructed that under the terms of the contract under which these stock were shipped, the defendant did not under 289 take to transport the stock within any particular time, but only with reasonable dispatch.

Therefore plaintiff cannot recover damages, if any, for the failure of the defendant or connecting carrier to arrive at point of destination at a particular time, but can recover damages on such grounds only by proving by a preponderance of the evidence that the defendant or connecting carrier by want of ordinary care and diligence failed to reach point of destination within a reasonable time, when considered in connection with all the facts and circumstances disclosed by the evidence in this case.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 14.*

If you find from the evidence that there were unreasonable delays, and that the stock were damaged by reason thereof, then in deter-

mining the amount of such damages, if any, for which the defendant is liable you must allow only such portion of the total damages so found as you find were caused by the want of ordinary care and diligence on the part of the defendant or connecting carrier, and must deduct from the total damages, if any, from unreasonable delays such portions thereof as arose from delays not caused by the want of ordinary care and diligence on the part of the defendant or connecting carrier, or that arose from the inclemency of the weather and the action of the elements, without negligence on the  
290 part of the defendant or connecting carrier.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 15.*

If you believe from the evidence that the cattle in question were by the negligence of defendant, injured during transportation, then you are instructed that the measure of damages would be the difference in the market value of such cattle at the place of destination at the time they arrived there, in their injured condition, if injured, and their market value at such place of destination in the condition they would have been in when they should have arrived there, but for such injury.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 16.*

If you find for the plaintiff, in assessing his damages for the loss of any animal which died *in route* you will, among other things, take into consideration the value of such animal at the time of shipment, and in determining such value, you will be limited by the provision of the contract of shipment, by the terms of which the plaintiff agreed that the value of the live stock to be transported under his contract did not exceed fifty dollars for each steer, fifty dollars for each bull, and thirty dollars for each cow, and in assessing plaintiff's  
291 damages, if any you find have accrued to him, you cannot value any of the animals shipped at a greater sum than the valuation placed upon it in said contract.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 17.*

You are further instructed that it is immaterial in the determination of this case whether or not the contract of shipment was signed by the plaintiff and received by him prior to the loading of the stock into the cars at Belgrade, or subsequent thereto, for the con-

tract itself provides that it is to be controlling between the parties as to said shipment without regard to whether the transportation of the stock shipped had already been commenced or undertaken by the company at the time of the execution of the same.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 18.*

You are further instructed that if you find from the evidence that the stock contract mentioned in the pleadings and introduced in evidence was received by the plaintiff at or about the time of shipment, and was accepted and signed by him; that he, or his agents, received and rode upon a free pass issued to him by the railroad company as a part of the contract of shipment and that no obstacles were thrown in his way to prevent his familiarizing himself with the terms of the contract and each and all of its conditions, then under 292 such circumstances it makes no difference whether plaintiff ever expressly assented to the contract or not, or whether he ever read or knew of its terms and conditions—under such circumstances he is fully bound thereby and is estopped from gainsaying or repudiating it.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 19.*

It is not contended by plaintiff, in the pleadings or evidence, that defendant expressly waived the provision of the contract requiring notice of the claim to be given before the stock was removed from the place of destination or mingled with other stock, but that the conduct of defendant and its agents constituted a waiver of such notice. If it appears from the evidence that the conduct upon which the alleged waiver is based occurred after the time for giving notice had expired, and there is nothing to indicate that defendant intended to waive its rights under the contract or to show that plaintiff was placed in any worse position by what was done, there was no waiver as a matter of law.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 20.*

You are instructed that one of the defenses relied upon by the defendant is that no notice of claim for damages for loss or injury to the stock in question was given by the plaintiff to the defendant or to the connecting carrier, before the stock were removed from the place of destination or mingled with other

stock. This provision of said contract is a reasonable one, binding upon the plaintiff, and under the admission in his reply, prevents him from recovering in this action, unless you find that after notice of said claim was given to defendant on January 26th, 1912, defendant expressly or impliedly by its conduct waived the giving of said notice in accordance with this provision of the contract.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 21.*

The Court instructs the jury that a stipulation in a special contract of carriage by a common carrier, limiting the liability of the carrier or fixing the time and manner of giving notice or presenting claims may be waived by the carrier impliedly, by conduct, as well as expressly. Thus when a claim is received and acted upon, after the expiration of the time limited without any objection on that account, the carrier may be deemed to have waived the benefit of whether or not the carrier has waived such condition in the contract in this case is a question for you to determine from all the evidence in the case.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 22.*

You are instructed that the law, on the grounds of public policy, will not permit a common carrier of passengers or freight, to contract against the liability for its own actual negligence, or that of its servants and employes; and though you may believe from the evidence that there was a special contract between the plaintiff and the defendant, that the defendant should not be liable for any loss or injury to the cattle in question, which might occur by reason of the inclemency of the weather, still, such a contract would not relieve the defendant from loss resulting from negligence, or want of ordinary care and prudence on the part of the defendant or its servants or employes; and in this case, if you believe, from the evidence, that the defendant was guilty of negligence, or want of ordinary care and caution, and that the loss complained of resulted therefrom, without any fault upon the part of the plaintiff, then he has a right to recover in this case.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 23.*

The jury are instructed that the carrier of livestock for pay must exercise reasonable diligence in the business, and complete the jour-

ney within a reasonable time, and if he does not do so, and the stock is injured by the delay, the carrier will be liable to the owner for all damage caused by such delay. What would be an unreasonable delay in forwarding and transporting said cattle, or what 295 would be a reasonable time within which said cattle should have been transported, are purely questions of fact for your exclusive determination from all the facts and circumstances in evidence before you.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 24.*

The Court instructs the jury that if they find from the evidence in the case that the cattle described in the complaint, or any of them, died or were injured while in the custody and care of the defendant, and such death or injury was not the result of some inherent want of vitality, or of injuries inflicted by such cattle upon each other, or by unavoidable accident, the defendant will be liable; unless it is established by a preponderance of the evidence that such death or injury was occasioned by some other cause than the negligence of the defendant, and in the absence of such proof the law will presume negligence on the part of the defendant.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 25.*

The Court instructs the jury that the common carrier may, by special contract, limit its liability for loss and damage resulting from delay, except when such delay, if any, is the result of the carrier's negligence, and in such case the carrier cannot limit its liability, 296 by special contract or otherwise. Negligence consists in a want of that care that would be exercised by an ordinarily prudent person under like circumstances. The handling of defendant's trains was a matter peculiarly within the power of the defendant. The plaintiff could exercise no control. He was bound to await the will and action of the defendant; and if his cattle were injured as a result of negligent delay on the part of the defendant, plaintiff is, in the absence of negligence or fault on his part, entitled to reasonable compensation for such damages as he may have suffered by reason of loss or injury to his stock, not exceeding the value of such livestock as fixed in the special contract.

Given:

BEN B. LAW,  
*District Judge.*

*Instruction No. 26.*

Should you find for the plaintiff under the instruction herein given, you are instructed that the measure of damages for the loss of cattle

dying, if any, from injuries received in transportation, through the negligence, if any, of the defendant, is the market value of the cattle at the time and place of destination; as to those injured, if any, the difference between the market value, if any, of the cattle at the time and place of destination in the condition in which they would have arrived if properly handled and transported, and their market value at the time and place of destination in the condition in which they did arrive there, but the amount of such damages may not exceed the value of such livestock as fixed by the special contract.

Given:

BEN B. LAW,  
*District Judge.*

The foregoing instructions numbered respectively from one to twenty six inclusive are the instructions given in this case.

Dated this 6th day of March A. D. 1913.

Given:

BEN B. LAW,  
*District Judge.*

After argument of counsel, the jury retired to consider of their verdict, and thereafter, and on the 6th day of March, 1913, returned into court and presented their verdict in favor of the plaintiff in the sum of \$879.60.

That thereafter, and on said 6th day of March, 1913, the court made an order giving defendant sixty days in which to serve and file bill of exceptions on motion for a new trial.

That thereafter, and by stipulations by and between counsel for plaintiff and defendant, the time for preparing and serving said bill of exceptions was extended to August 1st, 1913.

That on the 6th day of March, 1913, judgment was signed and filed and entered in said case, and notice of entry of same served on counsel for the defendant.

That thereafter, and on March 10, 1913, defendant served its notice of intention to move for a new trial on counsel for plaintiff, which notice is in words and figures as follows, to-wit:

(Title of Court and Cause.)

*Notice of Intention to Move for a New Trial.*

To the Plaintiff Above Named, and to Walter Aitken, His Attorney:

You will please take notice that the defendant, Northern Pacific Railway Company, intends to move the court to vacate and set aside the verdict rendered in the above entitled cause, and to grant a new trial of said cause, upon the following grounds, to-wit:

1. Misconduct of the jury.
2. Insufficiency of the evidence to justify the verdict.
3. That the verdict is against the law.

4. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon a bill of exceptions hereafter to be prepared and settled in said cause.

This notice is given within ten days after notice of the entry of Judgment in the above entitled action.

Dated this 10th day of March, 1913.

HARTMAN & HARTMAN,  
GUNN, RASCH & HALL,  
*Attorneys for Defendants.*

299     STATE OF MONTANA,  
*County of Lewis and Clark, ss:*

E. M. Hall, being first duly sworn, deposes and says: That he is one of the attorneys for the Defendant, Northern Pacific Railway Company, in the above entitled action; that the attorneys, Hartman & Hartman, for said defendant, reside, and have their offices, in Bozeman, Montana, and the attorneys, Gunn, Rasch & Hall, for said defendant, reside, and have their offices, in the City of Helena, Montana; that Walter Aitken, attorney of record for the plaintiff in said action, resides, and has his office, in the city of Belgrade, Montana; that between said places there is a regular communication by mail; that affiant served the foregoing notice of intention for a new trial upon said Walter Aitken, attorney for Plaintiff, by depositing a letter containing a copy thereof in the post office at Helena, Montana, on March 10, 1913, addressed to said Walter Aitken, Attorney at Law, Belgrade, Montana, with the necessary postage thereon to carry said letter prepaid.

E. M. HALL.

Subscribed and sworn to before me this 10th day of March, 1913.

[SEAL.]

W. W. PATTERSON,  
*Notary Public for the State of Montana,*  
*Residing at Helena, Montana.*

My commission expires May 6, 1914.

Filed March 13, 1913.

300     The defendant, Northern Pacific Railway Company, now presents this its proposed bill of exceptions in the above entitled cause, and asks that the same be signed, settled and allowed as a true and correct bill of exceptions therein.

HARTMAN & HARTMAN,  
GUNN, RASCH & HALL,  
*Attorneys for Defendant.*

Service of the foregoing bill of exceptions, and receipt of copy thereof, acknowledged this 15th day of July, 1913.

WALTER AITKEN,  
*Attorney for Plaintiff.*

It is hereby stipulated that the foregoing bill of exceptions is correct, and may be signed, settled, certified and allowed by the court.

Dated this 19th day of July, 1913.

WALTER AITKEN,  
*Attorney for Plaintiff.*  
GUNN, RASCH & HALL,  
HARTMAN & HARTMAN,  
*Attorneys for Defendant.*

STATE OF MONTANA,

*County of Gallatin, ss:*

I, Ben B. Law, Judge of the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Gallatin, do hereby certify that the foregoing bill of exceptions is true and correct, and is hereby settled and allowed by me.

301 Dated this 20th day of August, 1913.

BEN B. LAW, *Judge.*

Filed August 20, 1913.

PLAINTIFF'S EXHIBIT NO. 1.

| 2d. | 3d. | 4th. | 5th. | 6th. | 7th. | 8th. | 9th. |
|-----|-----|------|------|------|------|------|------|
|-----|-----|------|------|------|------|------|------|

|      |      |      |      |      |      |      |      |      |      |
|------|------|------|------|------|------|------|------|------|------|
| Max. | Min. |
|------|------|------|------|------|------|------|------|------|------|

|                  |     |     |     |     |     |     |     |     |     |     |     |     |    |     |     |     |
|------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|----|-----|-----|-----|
| Boseman ..       | 13  | -14 | 15  | -12 | 20  | -4  | 20  | -3  | 3   | -7  | 1   | -12 | 24 | -9  | 36  | 18  |
| Big Timber.      | 24  | -2  | 25  | -2  | 34  | -14 | 34  | -2  | 4   | -6  | 6   | -3  | 25 | -2  | 25  | -2  |
| Billings ....    | 18  | -19 | 12  | -26 | 25  | -15 | 15  | -6  | 5   | -17 | 16  | -30 | 24 | -7  | 12  | -6  |
| Huntley ...      | 23  | -15 | 27  | -7  | 26  | -6  | 24  | -9  | 2   | -18 | 11  | -34 | 23 | -4  | 18  | -6  |
| Miles City... -4 | -15 | 15  | -25 | 18  | -17 | -10 | -15 | -10 | -22 | 5   | -36 | 14  | -0 | 0   | -10 |     |
| Fallon ....      | 5   | -19 | 13  | -31 | 16  | -24 | 6   | -24 | -10 | -27 | 15  | -37 | 12 | -12 | 6   | -11 |
| Glendive ...     | 5   | -25 | 11  | -11 | 11  | -11 | -10 | -20 | -12 | -28 | 10  | -12 | 10 | -12 | 8   | -20 |

Minus sign (-) indicates temperature below zero.

LOCAL OFFICE WEATHER BUREAU,  
HELENA, MONT., January 29, 1913.

I hereby certify that the above is a true copy, from the original record, of the temperatures at the stations named on the date given, as kept by the observers of the Weather Bureau, said original records being in the custody of this office.

R. F. YOUNG,  
*Section Director.*

## PLAINTIFF'S EXHIBIT NO. 2.

Address correspondence to Official in Charge, Local Office, Weather Bureau.

U. S. Department of Agriculture,  
Climatological Service of the Weather Bureau.  
North Dakota Section.

BISMARCK, Feb. 3, 1913.

302 Mr. Walter Aitken, Belgrade, Montana.

DEAR SIR: Re yours of the 30th ultimo:

I take pleasure in furnishing herewith temperature date covering the period January 5th to 12th, 1913, both dates inclusive, along the main line of the Northern Pacific Railway Company.

*Stations.*

| Date.     | Fargo. | Oriska. | James-town. | Bismarck. | Dickinson. | Beach. |      |      |      |      |      |      |
|-----------|--------|---------|-------------|-----------|------------|--------|------|------|------|------|------|------|
|           | Max.   | Min.    | Max.        | Min.      | Max.       | Min.   | Max. | Min. | Max. | Min. | Max. | Min. |
| 5th.....  | -22    | -30     | -8          | -34       | -20        | -31    | -17  | -28  | -10  | -26  | -10  | -28  |
| 6th.....  | -15    | -29     | -8          | -27       | -20        | -24    | -17  | -26  | -17  | -25  | -18  | -28  |
| 7th.....  | -4     | -29     | -8          | -30       | -5         | -20    | -1   | -29  | -2   | -30  | -5   | -31  |
| 8th.....  | 2      | -20     | -1          | -22       | -4         | -19    | 0    | -6   | 7    | -18  | 8    | -10  |
| 9th.....  | -12    | -23     | -10         | -20       | -15        | -20    | -6   | -23  | -2   | -16  | -8   | -17  |
| 10th..... | -18    | -29     | -10         | -25       | -17        | -25    | -18  | -29  | -15  | -22  | -14  | -24  |
| 11th..... | -23    | -38     | -18         | -39       | -21        | -38    | -24  | -37  | -20  | -44  | -4   | -37  |
| 12th..... | -7     | -38     | -18         | -37       | -10        | -39    | 0    | -38  | -11  | -20  | 26   | -39  |

I hereby certify that the above data was tabulated by me from the original records of the United States Weather Bureau, that the same were compiled under my supervision by observers in the Climatological Service of the Weather Bureau, and that the date contained therein was obtained from standard instruments belonging to the U. S. Government.

ORRIS W. ROBERTS,  
*Section Director.*

Subscribed and sworn to before me this 4th day of February in the year of our Lord 1913. My commission expires Nov. 6, 1914.

C. H. OLSON,  
*Notary Public.*

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## PLAINTIFF'S EXHIBIT 3.

Docket No. 4596.

Wood Brothers.

Established 1867.

Telephone yards 548.

Live Stock Commission Merchants.

Chicago, So. Omaha, Sioux City, So. St. Paul.

Union Stock Yards, Chicago.

1-15-1912.

James Wood, Walter E. Wood, Kay Wood, Charles A. Wood.

Sold Account of Rob J. Wall.

Shipped by R. J. Wall Po.

From Belgrade.

| Date.              | Purchaser. | Cattle. | Class. | Brand. | Wt.    | Off.<br>price. | Amt.     | Total.     |
|--------------------|------------|---------|--------|--------|--------|----------------|----------|------------|
| S. & SQ.....       | 19         | Steers  |        |        | 21,400 | 6.00           | 1,284.00 |            |
| ".....             | 20         | "       | "      |        | 23,520 | 6.00           | 1,411.20 |            |
| ".....             | 4          | "       | "      |        | 3,920  | 5 1/4          | 205.80   |            |
| Hammond .....      | 14         | cows    |        |        | 13,720 | 5.00           | 686.00   |            |
| ".....             | 25         | "       | "      |        | 27,060 | 5.00           | 1,353.00 |            |
| ".....             | 10         | "       | "      |        | 11,180 | 4.50           | 503.10   |            |
| ".....             | 2          | "       | "      |        | 2,160  | 4.00           | 86.40    |            |
| D.Gunthanson ..... | 2          | bulls   |        |        | 2,360  | 4.60           | 108.56   |            |
| G. R. Co.....      | 1          | dead    |        |        |        |                | 5.00     |            |
| ".....             | 1          | "       |        |        |        |                | 5.50     |            |
|                    |            |         |        |        |        |                |          | \$5,648.56 |

## St. Paul.

| Car<br>No.             | Weight. | Rate.  | Amt.                       | Freight including ter-<br>minals..... | 839.83 |
|------------------------|---------|--------|----------------------------|---------------------------------------|--------|
| 820                    | 24,200  | 63 1/2 | 153.67                     | Yardage .....                         | 24.00  |
| 62593                  | 25,000  | "      | 158.75                     | Hay lbs. ....                         | 31.90  |
| 62790                  | 26,200  | "      | 166.37                     | Bedding .....                         |        |
| 63741                  | 25,400  | "      | 161.29                     | Shipping charges .....                |        |
|                        |         |        | 25.20                      | Range charges .....                   |        |
|                        |         |        | 58.80                      | Commissions .....                     | 48.00  |
|                        |         |        |                            |                                       | 943.73 |
| St. Paul .....         |         | 54.80  | Net proceeds .....         | \$4,704.83                            |        |
| Fargo .....            |         | 24.00  | Currency .....             |                                       |        |
| Montgomery .....       |         | 41.25  | Directions for money ..... |                                       |        |
| Ton .....              |         | 8.00   |                            |                                       |        |
|                        |         | 852.13 |                            |                                       |        |
| Less Frt. on Bull..... |         | 12.30  |                            |                                       |        |
|                        |         | 839.83 |                            |                                       |        |

## PLAINTIFF'S EXHIBIT NO. 4.

Docket No. 4596.

James Wood, Walter E. Wood, Kay Wood, Charles A. Wood.

Wood Brothers.

Established 1867.

Live Stock Commission Merchants.

Chicago, So. Omaha, Sioux City.

Union Stock Yards.

Telephone Yards 548.

(Pstt. 5-31-'12.)

CHICAGO, Jan. 25, 1912.

Mr. G. A. Perry, F. C. A., Nor. Pac. Ry., St. Paul, Minn.

DEAR SIR. Enclosed find duplicate amount of sales for four car-loads of cattle sold by us for account of Rob't J. Wall, Belgrade, Montana, on January 15th. Also certified statement of the Stock Yards Company.

These cattle were billed out at 2 P. M. on January 2nd were unloaded at Billings and reloaded at 3 A. M. Jan. 4th, and the train pulled out at 8 A. M. same date. Got to Dickinson about 2 P. M. on the 5th, where one of the cattle was found hurt and quite a few down. Stayed there until the next night, and pulled out about 11 P. M. of the 6th; at Jamestown, N. D., found the cow that was hurt dead, and asked that the car be unloaded, but no attention 305 was paid to request. Got to Fargo about 8 A. M. on the 8th.

Was loaded at 11 P. M. and pulled out about midnight. Made very poor time from Fargo to Staples, being side tracked for six hours and when the stock arrived at Little Falls one cow was found dead. The shipment was 37 or 38 hours on the road between Fargo and St. Paul. Left St. Paul about 9 P. M. of the 11th and made very poor time to La Crosse. At Savannah found one cow down. She was penned up there but died in Montgomery. Unloaded at Montgomery at 11 A. M. Jan. 13th. The cattle arrived in Chicago about 2 A. M., Monday, January 15th.

These cattle were intended for the early market of January 9th and for the loss sustained, by reason of the long delay to which the shipment was subjected, we are putting in claim on behalf of Mr. Wall as follows:

|  |            |
|--|------------|
| 40c depreciation in value on acct. appearance of cattle, |            |
| 105,320 lbs. ....  | \$421.28   |
| 150 lbs. shrink, 98 cattle, 14,700 lbs., at \$5.36. .... | 787.92     |
| Two dead cows, av. wt. 1,104 lbs. at \$4.85. ....        | 107.09     |
| Feed at Dickinson. ....                                  | 58.80      |
| Feed at St. Paul. ....                                   | 54.80      |
| Feed at Chicago. ....                                    | 31.90      |
| Total. ....  | \$1,481.79 |

Kindly see that voucher in Mr. Wall's favor is forwarded to us  
at an early date, and oblige,

Yours very truly,

WOOD BROS.

A. J. F.

306 James Wood, Walter E. Wood, Kay Wood, Charles A. Wood.

Wood Brothers.

Established 1867.

Live Stock Commission Merchants.

Chicago, So. Omaha, Sioux City.

UNION STOCK YARDS,  
CHICAGO, Feb. 9, 1912.

Telephone Yards 548.

Mr. J. F. Horrigan, F. C. A., Nor. Pac. Ry., St. Paul, Minn.

DEAR SIR: Please refer to your claim No. L. S. 4324, in favor of Robt. J. Wall, Belgrade, Mont., loss sustained by him on shipment of cattle sold by us for his account of January 15th.

We failed to include in the statement, item of one dead cow, and also to allow a credit of \$10.50 proceeds of sale of two dead sold here, and desire to amend the same to that extent, making the claim read as follows:

|   |            |
|---|------------|
| 40 cents depreciation in value on acct. appearance of cattle, 105,320 lbs. .... | \$421.28   |
| 150 lbs. shrink, 98 cattle, 14,700 lbs., at \$5.36. ....                        | 787.92     |
| Three dead cows av. wt. 1,104 lbs. at \$4.85. ....                              | \$160.63   |
| Less. ....  | 10.50      |
|   | 150.13     |
| Feed at Dickinson. ....   | 58.80      |
| Feed at St. Paul. ....  | 54.80      |
| Feed at Chicago. ....   | 31.90      |
| Total. ....   | \$1,504.83 |

307 Will you kindly hurry investigation of this matter and oblige.

A. J. F. Yours very truly,

WOOD BROS.

PLAINTIFF'S EXHIBIT No. 5.

Docket No. 4596.

PLAINTIFF'S EXHIBIT No. 6.

Docket No. 4596.

(Received Mar. 9, 1912, Frt. Claim Office, N. P. Ry. Co.)

Walter Aitken, Attorney at Law.

Office over Belgrade State Bank, Belgrade, Montana.

MARCH 6, 1912.

Mr. J. F. Horrigan, F. C. A., N. P. Railway Co., St. Paul, Minn.

DEAR SIR: Referring to your claim No. L. S. 4324 in favor of Mr. Robert J. Wall of Belgrade, Montana, which was referred to you by Wood Brothers of Chicago, Mr. Wall has requested me to write to you and ask when he may expect a decision from you in the matter. This claim was filed with you along about January 26th, 1912, and it would seem you have had plenty of time in which to reach a decision.

Please advise me of your probable action in the matter because if the claim is not settled soon we expect to commence an action to enforce it.

Yours truly,

WALTER AITKEN.

W. A. F. A.

PLAINTIFF'S EXHIBIT No. 7.

Docket No. 4596.

Northern Pacific Railway Company.

General Freight Department.

Office of Freight Claim Agent.

ST. PAUL, MINN, March 28, 1912.

Mr. Walter Aitken, Attorney at Law, Belgrade, Mont.

DEAR SIR: Replying to your letter of March 6th, in connection with claim presented in favor of Mr. Robert J. Wall through Wood Bros., of Chicago.

I wish to advise you that in view of the very excessive claim in this connection, it is necessary that we make a very extensive investigation, and at this time we are not in a position to advise you. However, I will put forth every effort to bring our investigation to a completion, and advise you results.

Yours truly,

J. F. HORRIGAN, F. C. A.

PLAINTIFF'S EXHIBIT No. 8.

JAN. 2nd, 1912.

Vi left Belgrade the 2d day of Jan.; got to Billings 3d in the morning 8 cl. Vi loaded 3 o'clock and left 8 o'clock morning the 4th. Vi got to Dickinson 2 cl. the 5th of Jan.; Vi left about 11 cl. the 6th; one cow hurt at Dickinson; dead at Fargo; Vi got to Fargo 8 cl. mor. the 8th; Vi loaded at midnight between 8—Vi was sidetracked between Fargo and Staples and Vi was *igen* sidetrack between Staples and Little Falls—one cow was dead at Little Falls. Vi got to St. Paul the 12th about 2 cl. afternoon; Vi left St. Paul the 11th 9 cl. ev. Vi made poor time between St. Paul and La Crosse one cow was down at Savannah and dead at Montgomery. Vi got to Montgomery 11 cl. the 13th; Vi was 38 hours between St. Paul and Mont. Vi loaded on the 14th between 5 and 7 cl. Vi got to Chicago 3 cl. morn. the 15th.

CHAS. HANSEN,  
*Maudlow, Montana.*

DEFENDANT'S EXHIBIT No. 1.

Docket No. 4596.

From 270 Revised 3-19-08.

The rate paid for shipment under this contract is a reduced rate based on the united value of the stock as stated below. If the stock is valued at more than the figures stated in this contract, agents will furnish contracts, Form 29 $\frac{1}{2}$ , which will not so limit value and the rates shown in tariff applicable to higher valuations will be charged.

Northern Pacific Railway Company.

Live Stock Contract.

To be executed before shipment is accepted.

No. of Car Initials.

W. B. No.

7 90946 N. P.

8 15922 N. P.

310 9 16398 N. P.

10 91412 N. P.

BELGRADE, MONTANA, STATION, January 2, 1912.

This agreement, made the day above stated between the Northern Pacific Railway Company, hereinafter called the "Company" and R. J. Wall, hereinafter called the "Shipper."

Witnesseth, that the company has this day received from the shipper at Belgrade, Montana, four carloads of cattle consigned to Wood Bros., at Chicago, Ill., to be transported by the company to destination, or in case the destination is not on the line of the company to the usual point on its line for delivery to a connecting line of railroad over which the same will pass in reaching the destination, at the published tariff rate which applies to shipments under a limited liability contract, the same being a reduced rate made upon the terms and conditions following, which are admitted and accepted by the undersigned shipper as just and reasonable, that is to say:

1. The Company shall not be liable for the loss or death of or injuries to the stock unless the same is caused by the negligence of said Company, its agents or employees.

2. The Shipper assumes all risk of damage or delay to his stock arising from or incident to the inclemency of the weather and the action of the elements, knowing that said stock is liable to be exposed to danger and risk therefrom, and hereby releases the Company from all liability for damages caused thereby.

3. And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to-wit: Each horse, one hundred dollars; each mule, one hundred dollars; each stallion, one hundred dollars; each jack, one hundred dollars; each ox or steer, fifty dollars; each bull, fifty dollars; each cow, thirty dollars; each calf, ten dollars; each pig, ten dollars; each sheep or goat, three dollars, such valuation being that whereon the rate of compensation to said carrier for its services and risks connected with said property is based.

4. The said Shipper agrees that said shipment shall be accompanied by one or more attendants, according to the rules of the Company, who shall have authority to represent the shipper in all matters pertaining to the resting, feeding, stopping and general care and handling of the stock. That the loading, unloading, care of, feeding and watering of said stock, while being transported, or while it is in the possession or custody of said Company, or where the same may be unloaded for any purpose, shall be performed by the attendant or under his direction and at the sole risk and expense of said Shipper. And if said Shipper fail, for any reason, to furnish said attendant whatever shall be done by the employees or agents of said Company with respect to the loading, unloading, reloading, care of, feeding or watering of said stock, shall be considered as done by them at the instance and request, and as representatives, of the said Shipper, and the said Company shall not be liable for anything done or omitted to be done by said employees or agents in respect thereto.

5. The said Shipper himself assumes the duty to properly and securely place all of said stock on the cars and to keep said cars

securely locked and fastened so as to prevent escape by said stock therefrom; and in case partitions or decking are put in the cars, said partitions or decking must be put in by the Shipper at his own expense and risk, and the said Company will in no way be responsible for their sufficiency of any damage of any kind caused by defects in the same; and said Shipper assumes all risk of injury to said stock in consequence of the partitions or decking being defective.

6. The said Shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said Company before said stock has been removed from the place of destination or mingled with other stock.

7. It is further agreed and provided that no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be suspended by any court against said Company unless suit or 313 action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said Company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding.

8. The said Company shall not be liable for the non-delivery or loss of, nor for injuries suffered by any of the stock beyond the line of its own railroad.

9. The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said Company, to which the said property may come for purpose of transportation.

10. The said Shipper agrees to examine the cars to be used before loading, and, unless written objection is made before shipment, he hereby acknowledges and admits the cars furnished by said Company to be sufficient and suitable in every respect for the shipment of said stock, and hereby assumes all risk of injury which the animals, or either of them, may receive in consequence of any of them being wild, unruly or weak, or maiming each other or themselves, or in consequence of heat or suffocation or other ill effects of being crowded in the cars, or injury to the burnish of straw, hay, or other material placed in or about the car; also all 314 risk of damage which may be sustained by reason of any delay in such transportation, and all risk of escape of any portion of the stock. The said Shipper also assumes all risk of damage and injury to said stock caused by want of a sufficient water supply arising from the freezing of pumps or water pipes.

11. The Shipper guarantees that the stock shipped under this contract is not infected with and has not been exposed to any infectious disease, and if it shall be hereafter determined that said live stock is so infected, or has been exposed to infection, then the Shipper will reimburse the Company the expense of disinfecting

the cars in which such stock is carried and any stock yards in which it may be placed in transit, and the decision of any state or federal inspector authorized to inspect said stock shall be conclusive evidence of the infection or exposure to infection.

12. All of the provisions of this contract are to be controlling between the parties hereto as to said shipment without regard to whether the transportation of such shipment has already been commenced or undertaken by said Company or otherwise.

13. The lien of the Company and right of possession as security for charges as a carrier shall remain unaffected by any stoppage of the stock or removal thereof from the trains and yards of the Company for resting, grazing or other purposes.

315 14. The said Shipper shall be entitled to transportation for himself or his employes only in accordance with the rules of this Company.

B. DIEZ, *Agent*, 82.  
R. J. WALL, *Shipper*.

(Written across the face of the contract is the following): Via C., B. & Q. Minn. Transf. Loaded at 3 P. M. Jan. 2nd, 1912.

On the back of the contract is the following: Give original contract to shipper. Send duplicate by first mail to general freight office.

#### Form 270.

Northern Pacific Railway Company.

BELGRADE, MONT., 1-2-1912.

#### *Live Stock Contract.*

To be executed before shipment is accepted.

Personal signatures only and in ink.

1. Christ Hansen.

2 Chas. Hansen.

3

4

Agent punch here number of men.

All persons entitled to transportation on *which* contract must enter their personal signatures above. Agents are strictly forbidden to allow any person to sign his name on contract who is not going with shipment, or to permit one person to sign the name of another.

Number of cars 4.

Name of Shipper R. J. Wall.

316 The agent will insert below the names of persons entitled to transportation under this contract on freight trains only, and cancel blank spaces by ink lines to prevent any additions.

1. Christ Hansen..

2 Chas. Hansen.

3

4

Parties whose names are above are in charge of and accompanying the stock, and transportation is granted to them in consideration of the within contract.

J. P. DIEFENDERFER,  
*Agent, Belgrade, Montana, Station.*

*Instructions to Conductors.*

Conductors will pass above persons only and will collect full fare otherwise. All contracts must be punched.

Cancel any names of persons who are not with the stock, and should same name appear on more than one contract in same train, cancel name on all contracts but one.

To Agents: This contract must be taken up by Agent issuing return tickets and when completed in accordance with joint instructions of freight and passenger departments, will be accepted by Auditor of Passenger Receipts as authority.

*Receipt for Return Tickets.*

Received of Agent..... Station.  
317 Tkt. No....to..... Rate \$\_\_\_\_\_  
Signature.....  
Date.....

Tkt. No....to..... Free  
Signature.....  
Date.....

Tkt. No....to..... Free  
Signature.....  
Date.....

Tkt. No....to..... Free  
Signature.....  
Date.....

NOTE.—Agent issuing contract will leave blanks above for the number of persons accompanying stock and entitled to return transportation. Cancel other blanks with heavy lines.

*Return Tickets.*

*Instructions to Shippers.*

Return tickets, free or at reduced rate as covered by the rules of the Railway Company, may be secured by parties entitled to same

upon presenting and surrendering the original stock contract to the Company's ticket agent at point where the movement of the stock was completed or finished, and within thirty (30) days of the date of such contract.

Agent cannot extend limit.

The Union Depot Ticket Office at St. Paul will furnish return tickets only where applicants present and surrender the 318 original contract; others will apply at the General Freight Office.

Shippers or attendants will be required to identify themselves to ticket agent by signature and such other evidence as may be necessary. Unless satisfactory identification is given, the ticket agent will decline to issue a return ticket.

#### *Transportation Rules.*

The following rules apply in regard to free or reduced transportation for shippers or attendants with live stock business.

Women or children cannot be permitted to accompany live stock shipments, and no return transportation should be issued them on account of such shipments. Boys cannot be accepted as shippers or attendants, when under eighteen years of age.

No transportation will be granted in either direction with less than carload shipments. Attendants with such shipments must have ticket to cover their passage and purchased at the usual rates.

No return transportation will be issued on shipments of Emigrant Movables, Lumberman's outfit or Graders' outfit.

Pass one (1) man both ways with one (1) car horses.

Pass one (1) man one way with one (1) car of cattle, sheep, goats or hogs; return half first class fare.

Pass one (1) man both ways with one (1) car horses, cattle, sheep, goats or hogs between stations in Minnesota, North 319 Dakota and Wisconsin, when points of shipment and delivery are both within these states, or when shipments originate in North Dakota or Minnesota and are destined beyond Eastern terminals.

Pass one (1) man both ways with two (2) cars of horses, cattle, sheep, goats or hogs.

Pass two (2) men both ways with three (3) to give (5) cars of horses, cattle, sheep, goats or hogs.

Pass three (3) men both ways with six (6) to nine (9) cars of horses, cattle, sheep, goats or hogs.

Pass four (4) men both ways with ten (10) or more cars of horses, cattle, sheep, goats or hogs.

The agent at the station where the stock is loaded will give no tickets on account of the stock, but must enter upon the back of the contract the name or names of the persons who are actually entitled to pass free with the stock, and such persons must affix their personal signatures to the contract in blank spaces provided for same, such entries will form the authority of the conductor for their transportation with shipment.

Only the owner, shipper or his employes in actual charge of the stock will be entitled to free passage on account of the stock; and agents are forbidden to endorse upon stock contracts, as entitled to free passage, the name of any other person than that of the owner, shipper or such actual employee.

Contracts presented with applications for return transportation must be properly made out and punched by conductors of 320 trains handling the stock, and applicant must be properly identified by comparison of signature of such additional evidence as may be considered necessary, if signatures do not fully correspond.

Agents must carefully examine contracts for notations which may be made by conductors, which may affect the right of applicants to return tickets, and when any irregularities exist they should be reported to the General Freight Department."

#### EXHIBIT No. 2.

Docket No. 4596.

FARGO, Jan. 8, 1912.

Agent Fargo:

I, Christ Hansen, in charge of N. P. 91165 stock cattle Belgrade to Chicago, Jan. 2 WB 9 state that one red cow which arrived dead at Fargo. This cow was down in car when set in Dickinson stock yards. Cow was in a weak condition when reloaded at Dickinson, but stood up, but when moved at Jamestown cow was down on car floor again and did not get up again, being dead when car reached Fargo. There were several of the cattle down when set at Dickinson stock yards, this one being the only one which died. Cattle appear to be O. K. when unloaded at Fargo. Cow branded block quarter circle.

CHRIST HANSEN,  
CHAS. HANSEN.

321 DEFENDANT'S EXHIBIT No. 4.

Form 292 Revised 6-10 5M E.

Northern Pacific Railway Company.

*Live Stock Contract.*

No. of car No. Initials.

WB.

For transportation of livestock where value exceed amounts stated in ordinary contract.

..... Station ..... 191 ....

The Northern Pacific Railway Company herein referred to as the "Company" acknowledges the receipt from .....

herein referred to as the "Shipper" at.....  
of.....carload of.....consigned to.....  
at....., the value of which live stock the Shipper  
hereby declares does not exceed the following amounts:

|                       |                         |
|-----------------------|-------------------------|
| Each horse.....       | Each bull.....          |
| Each mule.....        | Each cow.....           |
| Each stallion.....    | Each calf.....          |
| Each jack.....        | Each pig.....           |
| Each ox or steer..... | Each sheep or goat..... |

The Company agrees to carry to its usual place of delivery at said destination if on its road, otherwise to deliver to another carrier on the route to said destination, and the shipper agrees to pay therefor at the published tariff rate applicable to shipments of live stock valued at not more than the figures above stated.

The property is shipped under the following terms which  
322 are understood and agreed to by both parties, namely:

1. The Company shall not be liable for delay in transit or for the loss or death of or injuries to the stock, unless the same is caused by the negligence of the Company, its agents or employes.

2. The Company does not undertake to transport the shipment within any particular time or for any particular market, but only with reasonable dispatch, and the company shall not be liable for any loss of market by reason of delay in transit. The Shipper assumes all risk of damage or delay to his stock caused by riots or strikes.

3. The Shipper will load, unload, care for, feed and water stock while in the possession of the Company and will furnish to go with the stock for that purpose one or more attendants, according to the rules of the Company. And if the Shipper fails for any reason to furnish such attendant, whatever shall be done by the Company with respect to the care of the stock in transit shall be considered as done by it at the request and as representative of the Shipper. If it is necessary for the purpose of the shipment to place partitions or deckings in the cars, the Shipper will put in such partitions or deckings at his own expense and risk and assumes all risk of injury to the stock by reason of any defects in such partitions or deckings or the constructions thereof.

4. As a condition precedent to the Shipper's right to re-  
323 cover any damages for delay in transit or for loss or injury  
to any stock, the shipper must give notice in writing of his  
claim therefore to some officer or station agent of the company before  
the stock has been removed from the place of destination or mingled  
with other stock.

5. All actions to recover damages for loss of or injury to any of the stock or upon any claim under this contract must be commenced within four months after the completion of the transportation herein provided for.

6. By this contract the Company agrees to transport only over its own line and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line. No

carrier shall be liable for such damage or injury not occurring on its own road or on its portion of the through route, nor after the stock has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this contract shall be deemed to exempt the initial carrier from any such liability so imposed. The terms of this contract shall apply to the transportation by each carrier on any portion of the route to destination as to its own line.

7. The Shipper guarantees that the stock shipped under this contract is not infected with and has not been exposed to any infectious disease and if hereafter it shall be determined that the live 324 stock is so infected or has been exposed to infection, then the Shipper will reimburse the Company the expense of disinfecting the cars in which such stock is carried and any stock yards in which it may be placed in transit, and the decision of any state or federal inspector authorized to inspect said stock shall be conclusive evidence of the infection or exposure of infection.

8. All of the provisions of this contract are to be controlling between the parties hereto as to said shipment without regard to whether the transportation of such shipment has already been commenced or undertaken by said Company or otherwise.

9. The lien of the Company and right of possession as security for charges as a carrier shall remain unaffected by any stoppage of stock or removal thereof from the trains and yards of the company for resting, grazing or other purposes.

10. The said Shipper shall be entitled to transportation for himself or his employes only in accordance with the rules of the Company.

..... Agent. .... Shipper.

(On reverse side:) Give Original Contract to Shipper. Send Duplicate by first mail to General Freight Office.

Form 292 (Revised May 1st, 1908).

Northern Pacific Railway Company.

*Live Stock Contract.*

To be executed before shipment is accepted.

- 325      1.  
          2.  
          3.  
          4.

(Personal signature only and in ink.)

(Agent punch here number of men.)

All persons entitled to transportation on within contract must enter their personal signatures above. Agents are strictly forbidden

to allow any person to sign his name on contract who is not going with shipment or to permit one person to sign the name of another.

Number of cars.....  
Name of Shipper.....

The agent will insert below the names of persons entitled to transportation under this contract on freight trains only, and cancel blank spaces by ink lines to prevent any additions.

(1) .....  
(2) .....  
(3) .....  
(4) .....

Parties whose names are above are in charge of and accompanying the stock, and transportation is granted to them in consideration of the within contract.

..... Agent.  
..... Station.

#### *Instructions to Conductors.*

Conductors will pass above persons only, and will collect 326 full fare otherwise. All contracts must be punched.

Cancel any name of persons who are not with the stock, and should same name appear on more than one contract in same train, cancel name on all contracts but one.

To AGENTS: This contract must be taken up by Agent issuing return tickets and when complete in accordance with joint instructions of Freight and Passenger Departments, will be accepted by Auditor of Passenger Receipts as authority.

#### *Receipt for Return Tickets.*

|                        |              |
|------------------------|--------------|
| Received of Agent..... | Station.     |
| Tkt. No. .... to ..... | Rate \$..... |
| Signature.....         |              |
| Date.....              |              |
| Tkt. No. .... to ..... | Free         |
| Signature.....         |              |
| Date.....              |              |
| Tkt. No. .... to ..... | Free         |
| Signature.....         |              |
| Date.....              |              |
| Tkt. No. .... to ..... | Free         |
| Signature.....         |              |
| Date.....              |              |

NOTE: Agent issuing contract will leave blanks above for the number of persons accompanying stock and entitled to return transportation. Cancel other blanks with heavy lines.

## Return Tickets.

*Instructions to Shippers.*

Return tickets, free or at reduced rate as covered by the rules of the Railway Company, may be secured by parties entitled to same upon presenting and surrendering the original stock contract to the Company's ticket agent at point where the movement of the stock was completed or finished and within thirty (30) days of the date of such contract. Agents cannot extend limit.

The Union Depot Ticket Office at St. Paul will furnish return tickets only where applicants present and surrender the original contracts; others will apply at the General Freight Office.

Shippers or attendants will be required to identify themselves to ticket agent by signature and such other evidence as may be necessary. Unless satisfactory identification is given, the ticket agent will decline to issue a return ticket.

For transportation rules see Nor. Pac. Ry. No. 23110 G. P. D. Circular No. 29, 1907, or subsequent issues.

*Rules as to Freight Rates on Live Stock.*

Valuation of live stock as basis for lowest tariff rates:

|                            |          |
|----------------------------|----------|
| One stallion or jack.....  | \$100.00 |
| One horse or mule.....     | 100.00   |
| One ox, bull or steer..... | 50.00    |
| One cow .....              | 30.00    |
| One calf or pig.....       | 10.00    |
| One sheep or goat.....     | 3.00     |

When Shipper's or owner's valuation exceeds those stated above, you will use this stock contract, and the freight rates will be increased by the rule stated in the published tariff over those for livestock of the above valuation.

## (Title of Court and Cause.)

*Notice of Appeal.*

To the above named Plaintiff, and Walter Aitken, his Attorney:

Please take notice that the defendant in the above entitled action hereby appeals to the Supreme Court of the State of Montana from the judgment rendered and entered in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Gallatin, on the 6th day of May, 1913, in favor of R. J. Wall, now deceased, and against said Defendant, in the sum of \$879.60 damages and \$78.30 costs, and from the whole thereof.

And take further notice that said Defendant likewise hereby appeals to the said Supreme Court of the State of Montana from the order made and entered in said action on the 28th day of Sep-

tember, 1913, overruling and denying said Defendant's motion for a new trial thereof.

This appeal is taken from each the said judgment and the order denying the motion for a new trial, and from the whole thereof.

329 Dated this 17th day of November, 1913.

HARTMAN & HARTMAN AND  
GUNN, RASCH & HALL,  
*Attorneys for Defendant.*

Served on November 20, 1913.

Filed November 21, 1913.

**STATE OF MONTANA,**  
*County of Gallatin, ss:*

I, W. L. Hays, clerk of the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Gallatin do hereby certify that the foregoing transcript contains a true copy of the complaint, demurrer to complaint, order overruling said demurrer, answer, demur to answer, order overruling said demurrer, reply, verdict, judgment, bill of exceptions, order substituting R. P. Wall, Administrator of the Estate of R. J. Wall, Deceased, as plaintiff, and denying motion for a new trial, and notice of appeal, except the formal parts thereof, as the same appear on file and of record in my office in the case entitled R. P. Wall, Administrator of the Estate of R. J. Wall, Deceased, plaintiff vs Northern Pacific Railway Company, a corporation, defendant; that said judgment was duly entered on the 6th day of March, 1913.

I further certify that a good and sufficient undertaking on appeal, in due form has been filed in my office in said cause.

330 In testimony whereof I have hereunto set my hand and affixed the seal of said court this 6<sup>th</sup> day of January, 1914.

[SEAL.]

W. L. HAYS,  
*Clerk of District Court.*

331

No. 3439.

**STATE OF MONTANA:**

In the Supreme Court, December Term, 1914.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased, Plaintiff and Respondent,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant and Appellant

Submitted: November 13, 1914.

Decided: December 18, 1914.

Filed: December 18<sup>th</sup>, 1914.

JOHN T. ATHEY, *Clerk.*

332 Mr Justice HOLLOWAY delivered the Opinion of the Court.

On January 2, 1912, R. J. Wall shipped four carloads of beef cattle from Belgrade, Montana, to the Chicago market over the Northern Pacific Railway as the initial carrier. The shipment did not reach its destination until January 15, and this action was instituted to recover damages which it is alleged resulted from unreasonable delays due to the railway company's negligence. From the judgment in favor of plaintiff and from an order denying it a new trial, the defendant appealed.

The complaint counts upon the carrier's common law liability. The answer sets forth a special contract under which, it is alleged, the shipment was made, and the execution of this contract is admitted by the reply. Appellant insists that the plaintiff was bound by the special contract; that he cannot sue for a breach of the carrier's common law duty, and that, by pleading a tort and proving a breach of the contract, a fatal variance resulted. The precise question was presented fully, considered at great length, and determined adversely to appellant, in *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 92 Pac. 642. A review of that decision confirms us in its correctness, and further discussion would be of no avail.

Paragraph 6 of the contract pleaded provides: "6. The  
333 said shipper further agrees that as a condition precedent to

"his right to recover any damages for loss or injury to any  
"of said stock, he will give notice in writing of his claim there-  
"for to some officer or station agent of the said company before  
"said stock has been removed from the place of destination or  
"mingled with other stock." In a few instances, provisions similar  
to this have been held to be in the nature of statutes of limitations,  
but the decided weight of authority holds, and the better reason  
is, that their effect is simply to limit the carrier's common law  
liability. That a common carrier may by special contract limit  
the liability which it would otherwise incur, provided the terms  
of the special agreement are reasonable, was recognized in the  
*Nelson case* and is the generally accepted doctrine in this country.  
(4 Rul. Case Law, secs. 230, 253.) Whether such special contract  
is or is not valid depends upon its reasonableness; and this question  
is always referable for solution to the facts and circumstances of  
the particular case. (*Queen of the Pacific*, 180 U. S. 49.)

At the time the contract in question was executed at Belgrade, the shipper and agent for the carrier understood that the line of the Northern Pacific Company did not extend to Chicago, and that from the Minnesota transfer, near St. Paul, to Chicago the stock would go forward over another line, the Chicago, Burlington & Quincy, which was designated in the contract as the connecting carrier. Notice of this claim was given on January 25, but in the answer it is alleged that such notice was not given until long after the cattle in question had been removed from the place of destination and

mingled with other stock, and this is admitted by the reply.

334 If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of

the Northern Pacific Company. Notice to an agent of the Burlington road would not have been effective for any purpose. The Company mentioned in paragraph 6 is defined by the preamble to the contract, to mean the "Northern Pacific Railway Company." Furthermore, if this provision is valid, it must be so construed as to serve some purpose. Its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made or a reasonable time therefor had elapsed. By the facts before us the reasonableness of the provision is to be tested. The contract is silent upon the question of service of the notice. If personal service was necessary, the shipper was required to hold the cattle at the Union Stock Yards until he could find an officer or station agent of the Northern Pacific Company. No particular officer or station agent is designated, and if this provision is to be taken literally, the shipper was required at his peril to assume the burden of finding some person who answered the description given. There is not a suggestion in the contract, in the pleadings or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of its road—more than 400 miles away. If service could have been made by mail, plaintiff would have been in no better position, though doubtless a letter written to the station agent at Belgrade, and mailed

335 postpaid at Chicago, would have suffered for a literal compliance with the terms of this provision. But in any event, plaintiff would have had to bear the burden of keeping his cattle on the cars or in the Stock Yards until the notice had been received and a reasonable time for inspection had elapsed. If the paragraph in question be construed to mean that a written notice mailed from Chicago to any station agent of the Northern Pacific Company, even the agent at Seattle would suffice, it is senseless. If it is construed to mean that the shipper should travel from Chicago to St. Paul and make personal service of the notice upon an officer or station agent of the Northern Pacific Company, then it is unreasonable to the point of being unconscionable. Whether the company had an officer or station agent at Chicago—at a point where it has no road—upon whom service of this notice could have been made, was a matter peculiarly within its own knowledge, and for this reason the burden was upon it to make proof of such fact.

If the carrier was negligent, resulting in unreasonable delay in the shipment and consequent damage, plaintiff's cause of action for a breach of common law duty, was complete without reference to notice. To escape liability, the burden was upon the carrier to plead and prove such a special contract as would effect a modification of the duty imposed by the common law. In the Nelson case, Mr. Commissioner Poorman, voicing the opinion of the court, said: "The effect of the special contract is, therefore, merely to create and define certain cases and conditions under which its full common-law liability shall not attach. The special contract is the evidence of such exception, and, to the extent to which it is valid, constitutes a defense, and as such must, therefore, be pleaded as a defense; the

336 "burden of proof resting on the defendant to establish  
"it."

The validity of paragraph 6 above depends upon its reasonableness, and it was therefore incumbent upon the carrier to show that it was relieved by the provision of a contract valid; in this instance reasonable. (Houtz v. Union Pac. R. R. Co., 33 Utah 175, 93 Pac. 439; 17 L. R. A. (n. s.) 628, and note.)

In Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166, there was presented a case in all particulars identical with the one before us, and the court there said: "If a carrier sets up a claim to notice of a given fact as a condition upon which its liability to a shipper is to depend, then it is incumbent upon it, when the notice was to be given to one of its own officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier. This would be especially true when the property to be inspected is intended for immediate sale at the place of destination, is perishable in character, likely to deteriorate in value by holding, and expensive to keep. If in such case the carrier has not an officer or agent at or near the place where the property to be inspected is delivered, so that notice may be promptly given and an inspection if desired, speedily made, then a contract requiring notice to be given to any officer or agent of the carrier is not reasonable in its character." To the same effect is Baxter v. L. N. A. & C. R. Co., 165 Ill. 78, 45 N. E. 1003.

Our conclusion is that this provision of the special contract, in the absence of any showing that it was reasonable, was not binding upon the shipper, and this disposes of all other related questions.

By Instruction 4 the trial court imposed upon the plaintiff the burden of proving negligence on the part of the defendant which resulted in the damages claimed. By Instruction 10 the jury were informed that proof of unusual delays alone was not sufficient to establish negligence. By Instruction 23 the court declared that the law imposes upon the carrier the duty of exercising reasonable diligence in its business and to complete the journey within a reasonable time, "and if he does not do so, and the stock is injured by the delay, the carrier will be liable." The court then told the jury that whether a given time was or was not reasonable, was a question of fact to be determined by the jury from all the circumstances of the case as presented by the evidence. There is not any conflict in these instructions. They are to be construed together. No. 4 fixes the burden of proof. No. 10 warns the jury as to the quantum of proof required; and No. 23 does nothing more than refer the question of reasonableness, under the circumstances of the given case, to the jury for determination upon the evidence before them.

There is not any conflict between Instruction 4, which fixes the burden of proof, and No. 24, which directs the jury how that burden may be met. Neither are we able to agree with counsel for appellant that Instruction No. 24 is inherently erroneous. An in-

338 struction in all essentials identical with it was approved by the court in the Nelson case.

Appellant contends most earnestly that plaintiff failed to show that the delays in the course of transportation were chargeable to the carrier's negligence. No useful purpose would be served by reviewing the evidence at length; we content ourselves with saying we think the evidence in its entirety sufficient to sustain the verdict. If counsel for appellant mean that plaintiff did not show the cause of every delay and thereby demonstrate that the delays resulted from negligence, then we agree with them; but we do not assent to the doctrine that plaintiff assumed any such burden. The movements of the train were under the exclusive management and control of the carrier, and the facts which caused the train to be delayed were peculiarly within the knowledge of the officers and agents of the railway company. As was pertinently remarked by the supreme court of Washington, in Jolliffe v. Northern Pacific Ry. Co., 52 Wash. 433, 100 Pac. 977: "A car may be sidetracked and delayed for one hour or for twenty-four hours by order of the train dispatcher, or some body in authority, hundreds of miles away, for a necessity which is apparent to him, and that necessity may have been brought about by negligence in the intricate management of the business by some responsible agent of the company a long distance from the location of the train which is sidetracked. There certainly can be no semblance of justice in relieving the party from making a disclosure who is in a position to make it, or in making an explanation which will excuse it if there be such an explanation available to

339 "him. This court and other courts have frequently said that where it is necessary to make a character of proof, which by

"reason of the circumstances surrounding the case, is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof." (See also note to Cleve v. Chicago, B. & Q. Ry. Co., 15 Anno. Cases, 33.)

To impose upon the shipper the burden of ascertaining the cause of every delay in the transportation of his property and refuse relief in the absence of such proof, would be tantamount to denying any right of action for damages resulting from negligent delays in transportation. Whatever may be said of the trial court's Instruction No. 10, when the plaintiff showed that the carrier consumed substantially thirteen days in delivering his stock in Chicago, over a route which usually consumes only six or seven days, he met the burden imposed upon him to make out a *prima facie* case, and called upon the defendant for explanation, as the party possessing knowledge of the facts which occasioned the delays.

In Nelson v. Chicago, B. & Q. Ry. Co., 78 Neb. 57, 110 N. W. 741, the court said: "While we do not hold that a railroad company is an insurer of the arrival of its trains on schedule time in the transportation of live stock or other freight, yet, where there is a material delay, the company must, to exonerate itself from liability, show that the delay arose from some other cause than its own negligence."

In Bosley v. Baltimore & O. R. Co., 54 W. Va. 563, 46 S. E. 613,

the court quoted with approval from 5 Am. & Eng. Enc. Law (2d ed.), 254, as follows: "It seems, however, that on proof of a delay in delivery, a prima facie case is made out against the carrier, and the burden of proof rests upon it to show that it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier and not easily ascertained by the shipper."

In Johnson v. New York, N. H. & H. R. R., 111 Me. 263, 88 Atl. 988, the court said: "If there were no other facts than those already stated, we think a jury would be warranted in saying that there was unreasonable delay somewhere in forwarding and transporting this car of strawberries; the time occupied being fifty-three hours instead of twenty-four hours or less, the ordinary time. It is so far sufficient that it puts the onus of explanation on the defendant."

In 4 Elliott on Railroads (2d ed.), section 1583, the rule is stated as follows: "The fact that there was unusual delay does not always show a breach of duty. \* \* \* The delay may be so great as to make it proper for the court to adjudge, as matter of law, that it was unreasonable, but, in accordance with the doctrine heretofore stated, the delay may be shown to have been a reasonable one under the facts and circumstances of the particular case, and, as a general rule, the question is one of fact, or of mixed law and fact, for the jury, under proper instructions. Where the delay is an unusual one, and is not explained, it is held to be prima facie evidence of negligence, but that, in a case where there is only a slight delay, the rule is different." (Tiller & Smith v. Chicago, B. & Q. Ry. Co. (Ia.), 112 N. W. 631; 6 Cyc. 506.)

In justice to appellant's contention it must be conceded that the authorities are by no means unanimous in supporting the rule as we have announced it, as a reference to 4 Rul. Case Law, sec. 464, and other texts, will demonstrate; but without reference to the weight of authority numerically considered, we have adopted the rule which in our judgment is most reasonable and imposes the least hardship.

It is insisted by counsel for appellant that even if it be held that plaintiff made out a prima facie case, it was completely overcome by the testimony of defendant in explanation of the delays. To give even a brief epitome of the testimony of defendant's twenty-three witnesses would extend this opinion needlessly. In our judgment, instead of fully exonerating the carrier, the evidence produced by it materially aided plaintiff's case.

We do not find any error in the record prejudicial to a substantial right of appellant, and direct that the judgment and order be affirmed.

Affirmed.

WM. L. HOLLOWAY,  
*Associate Justice.*

We concur:

THEO BRANTLY,  
*Chief Justice.*

SYDNEY SANNER,  
*Associate Justice.*

342 In the Supreme Court of the State of Montana, Eleventh Day  
of December Term, 1914.

FRIDAY, December 18, A. D. 1914.

Present: The Hon. Theo. Brantly, Chief Justice.

" " Wm. L. Holloway, Associate Justice.

" " Sydney Sanner, Associate Justice.

And the following among other proceedings was had:

#3439.

R. F. WALL, as Adm'r of the Estate of R. J. Wall, Deceased,  
Plaintiff and Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant and Appellant

This cause this day came on for the judgment and decision of the  
Court.

Whereupon on consideration it is now here ordered and adjudged by  
this Court, that the judgment of the district court of Gallatin  
county made and entered on the 6th day of May, 1913 and the order  
of said court made and entered on the 28th day of September, 1913  
denying defendant's motion for a new trial be and they are hereby  
affirmed, at the cost of the Appellant.

Opinion by Mr. Justice Holloway, Mr. Chief Justice Brantly and  
Mr. Justice Sanner concurring.

Minutes of the day's proceedings signed by

THEO. BRANTLY,  
*Chief Justice.*

Attested by

JOHN T. ATHEY, *Clerk.*

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Form 3312.

In the Supreme Court of the State of Montana.

No. 3439.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased  
Plaintiff and Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant and Appellant

*Motion for Rehearing.*

Comes now the appellant and respectfully moves the court to grant  
a rehearing of said case for the following reasons:

I.

That in discussing the reasonableness of paragraph 6 of the con-  
tract, relied upon by the defendant (Defendant's exhibit 1, tr. p.

309 et seq.), the court apparently overlooked the provisions of paragraph 9 of said contract, which reads as follows:

"The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said Company, to which the said property may come for purpose of transportation."

## II.

The court apparently overlooked the fact that in paragraph III of defendant's first further and separate defense (Tr. p. 10), the defendant alleged that no notice in writing or otherwise of any claim for damages was given "to any officer or station agent of the connecting carrier" and that such allegation was admitted by plaintiff.

## III.

That certain decisions of the Supreme Court of the United States, which are controlling authority where questions involving interstate interests are involved, were not cited nor discussed  
344 in the argument of said case and were apparently not considered by the court in its opinion, to-wit the cases of Atlantic C. L. R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167; Galveston H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. Ed. 516.

### *Argument.*

Appellant did not brief nor argue the reasonableness of the provisions of paragraph 6 of said contract from the view point considered by the court on page 3 to line 5 of page 7 of the opinion, for the reason that no such question was raised by the plaintiff in the court below. In fact the only grounds upon which the defendant attacked said provisions of the contract in his answer was that it "is unreasonable, unjust, burdensome against the policy of the law and contrary to the express provisions of chapter 138 of Session Laws of the State of Montana for 1909." Not until his brief was filed in this court did such question appear in the case.

In view of the provision of paragraph 9 of the contract, also of plaintiff's position in the court below, and of the fact that the defendant company has always considered that a notice served upon "some officer or station agent" of the connecting carrier at point of delivery in the manner required by paragraph 6 of the contract, was a sufficient notice to show a compliance with such provision in an action brought against the initial carrier, we did not consider the question as presented for the first time in respondent's brief of any importance and did not even reply thereto in our oral argument.

Under section 9 of said contract the terms and conditions thereof inure to the benefit of the connecting carrier. Therefore, such notice should be given to some officer or station agent of such  
345 carrier at point of delivery when damages are claimed.

The importance of this is apparent when considered in

connection with the Carmack Amendment to the Interstate Commerce Law.

While under such law the initial carrier is made liable for the acts of negligence of the connecting carrier, and an action may be prosecuted against it without joining the connecting carrier, still the initial carrier is entitled to reimbursement from the connecting carrier for such portion of the damages as occurred through the negligence of the latter. In the case of *Atlantic C. L. R. Co. v. Riverside Mill*, *supra*, the court said:

"Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state, to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence."

As the initial carrier is liable in the first instance for all the damages, by reason of negligence throughout the entire route of the shipment, and as the connecting carrier must reimburse it for any damage by reason of its negligence, it follows that the conditions contained in paragraph 6 of the contract, and which are expressly declared to inure to the benefit of the connecting carrier, should be observed and the shipper should file his notice of claim for damages with the connecting carrier that delivered the goods at the point of destination. In other words, under the express provision of the contract when the goods are delivered to a connecting carrier it is entitled to all the benefits under such contract that the initial carrier was had they been delivered to destination by it. The law is well

settled since the adoption of the Carmack Amendment that a notice for claim of damages, served upon the connecting carrier, is a sufficient notice to the initial carrier. It is a poor rule of law that does not work both ways. If a notice served upon the connecting carrier is also a notice upon the initial carrier, then why should a shipper, who has expressly agreed that the provisions of his contract shall inure to the benefit of the connecting carrier, be relieved from the provision of a contract requiring him to serve notice of his claim for damages before he has a right to maintain an action?

In *Chicago R. I. & G. Ry. Co. v. Linger*, 156 S. W. (Texas), 298, the defendants pleaded a contract containing a provision similar to paragraph 6. In this case they further pleaded that no notice was served upon an officer or agent of their company but was only served upon an officer or agent of the connecting carrier which delivered the goods at destination. In this case the court said:

"Defendant shows that if any notice of any claim for damages on account of said shipment was ever given by plaintiff to any one that it was to the officers and agents of the Chicago, Rock Island & Pacific Railway, connecting carrier of this defendant, and not to any of its officers or agents; that the Chicago, Rock Island & Pacific Railway Company is a foreign corporation, chartered under the laws of the state of Illinois, and in the handling of the shipment referred to

herein was not the agent of this defendant, and this defendant is not a partner of said Chicago, Rock Island & Pacific Railway Company, and is not bound by any notices given to or received by it in reference to shipments, and is not bound by any notice given to it or its agents by the plaintiff herein, and this defendant here pleads said provision of said contract in bar of plaintiff's right to recover herein."

The effect of the Carmack Amendment (Act June 29, 1906, c. 3591, sec. 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1911, p. 1307) is to abolish the stipulation for separate liability of connecting carriers of interstate freight, and to make any one carrier liable by action brought against it for the negligence of any or all of such carrier over which the shipment upon which the suit is based passed, and under the provisions of the act we think notice to either of the connecting carriers of loss or damage to the live stock in this case is notice to all."

In Atchison T. & S. F. Ry. Co. v. Word, 159 S. W. (Texas), 375, the court said:

347 "Stipulations in the contract of the initial carrier were ineffectual in so far as not authorized by the interstate commerce act, whether for its benefit or that of the intermediate carrier. Any provision valid in the initial carrier's contract for its own benefit will therefore inure to the benefit of the connecting carrier. Kansas City S. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. —.

In that case it is said: 'The liability of any carrier in the route \* \* \* for loss or damage is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act.' Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314; Railway Co. v. Latta, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. 328; Railway Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; Railway Co. v. Harriman Bros., 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. —.

It will be seen from the above authorities that the contract of the initial carrier is one fixing the liability of the parties executing the contract, as well as that of the connecting carrier."

Furthermore, even if paragraph 9 was not incorporated in said contract the connecting carrier would be, as a matter of law, the agent of the initial carrier and service of the notice upon an officer or agent of the connecting carrier is binding upon the initial carrier. In addition to the quotation above from Atlantic C. L. R. Co. v. Riverside Mill, supra, the court in said opinion also said:

"The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce and 'receiving property for transportation from a point in one state to a point in another state' as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents."

In Galveston H. & S. A. Ry. Co. v. Wallace, 56 L. Ed. 516, the court said:

"Under the Carmack amendment, as already construed in the Riverside Mills Case, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another state, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes

of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different states, but both on the company's railroad."

To the effect that contracts entered into between the shipper and the initial carrier, which provide that they shall apply to 348 connecting carriers, entitles the latter to demand compliance with the terms of such contracts and requires the shipper to give notice to the latter in accordance therewith, see also:

Missouri K. & T. Ry. Co. v. Garrett, 87 S. W. (Texas) 172;  
Adams Express Co. v. Byers, 97 N. E. (Ind.) 513;  
St. Louis etc. Ry. v. Wekkly, 8 S. W. (Ark.) 134;  
R. Garvan v. N. Y. Central etc. R. Co., 96 N. E. (N. Y.)  
717;  
St. Louis & S. F. Ry. Co. v. Keller, 119 S. W. (Ark.) 254.

The court in its opinion says:

"Furthermore, if this provision is valid it must be so construed as to serve some purpose. Its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made, or a reasonable time thereafter had elapsed."

Such is the purpose of paragraph 6 of the contract and is so recognized by all of the courts.

But, where the initial carrier is made liable for negligence of connecting carrier, it is all the more important that such a notice should be served upon the carrier delivering the stock at destination so that it, as agent of the initial carrier, can examine into the merits of the claim while the evidence of the damage is still available. It is for this reason that paragraph 9 is inserted, expressly making the terms of the contract applicable to "each and every carrier, beyond the route of said company, to which the said property may come for purpose of transportation." The court in its opinion also criticises the provision of paragraph 6 of said contract for the reason that it does not designate what particular agent or officer is to be served with such notice.

The contract requires that the shipper "will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

349 This provision certainly gives the shipper a much wider latitude than if it designated some particular agent, or class of agents or officers, upon whom the service must be made. All he is required to do is to give notice in writing to some officer or station agent. Should the company designate a particular agent, or class of agents, it might happen that no agent of that class could be found within a reasonable time after the property reached the point of destination. Furthermore, as stock, or goods, received by the initial carrier may go to anyone of a thousand different points of destination upon the lines of connecting carriers, it is impossible, at

the time of making the contract, to designate the particular agent, or class of agents, upon whom the notice must be served, and it is impossible for the initial carrier to have officers or agents of its own at the various points on the lines of connecting carriers to which stock may be shipped. Hence the provision that the terms and conditions of this contract shall inure to each connecting carrier and a service upon the officer or agent of such connecting carrier is considered by the railroad to be a compliance with this provision of the contract. If section 6 of the contract is unreasonable, because it does not designate the particular officer or agent to whom the notice is to be given, then subdivision 3 of section 6519 of the Revised Codes, providing the manner of serving summons, is also open to the same objection as it provides that "service may be made upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station keeper, managing agent, or other agent, having the management, direction or control of any property of such corporation." Evidently the purpose of said section of the statute, as well as of paragraph 6 of the contract, is to give the person required to make the service, or give the notice, the widest latitude so long as he finds some officer or agent of the carrier at point of destination upon whom he can give his written notice, he has complied with the terms of the contract.

350 For the foregoing reasons we believe a rehearing of the said case should be granted, or that the opinion now written should be modified so as not to hold that an initial carrier must have an officer or agent of its own company at each point where goods are delivered by a connecting carrier before it can legally insert a provision in a contract requiring that notice of the claim must be given in writing before the stock is removed from point of destination or mingled with other stock. The courts are practically unanimous in holding that such provisions in livestock contracts are reasonable and necessary for the protection of the interest of the carrier against unjust claims, but if the opinion of the court, as it is now written, is not modified it in effect deprives the initial carrier of the right to insist upon such a provision in the contract where the destination of stock is at a point upon the line of a connecting carrier.

Respectfully submitted,

W. S. HARTMAN &  
GUNN, RASCH & HALL,  
*Attorneys for Defendant and Appellant.*

351 In the Supreme Court of the State of Montana.

Seventeenth Day of December Term, 1914.

WEDNESDAY, JANUARY 6TH, A. D. 1915.

Present:

The Hon. Theo. Brantly, Chief Justice.  
" " Sydney Sanner, Associate Justice  
" " Wm. L. Holloway, Associate Justice.

And the following among other proceedings was had:

R. P. WALL, Admr., Plaintiff and Respondent,  
vs.

NORTHERN PACIFIC RY. CO., Defendant and Appellant.

Appellant's motion for a rehearing herein heretofore submitted is after due consideration by the court denied.

Minutes of the day's proceedings signed by:

THEO. BRANTLY,  
*Chief Justice.*

Minutes attested by:

JOHN T. ATHEY, *Clerk.*

352 In the Supreme Court of the State of Montana.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased, Defendant in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error.

#### *Assignments of Error.*

Now comes the plaintiff in error in the above entitled cause and says that the Supreme Court of the State of Montana erred in its decision and judgment in said cause as appears from the record therein, and that the errors committed are as follows, to-wit:

#### I.

That said court erred in holding and deciding that paragraph 6 of the livestock contract, under which the stock were shipped from the State of Montana to the State of Illinois, was unreasonable and not binding upon the shipper thereby denying plaintiff in error certain rights and privileges given it under the Act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce," and amendments thereto. Paragraph 6 of said contract, reads as follows, to-wit:

"6. The said Shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said Company before said stock has been removed from the place of destination or mingled with other stock."

#### II.

That said court erred in so holding and deciding that said paragraph 6 of said livestock contract was unreasonable and not binding upon the shipper when read in connection with paragraph 9 of said contract, which reads as follows, to-wit:

"9. The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said Company, to which the said property may come for purpose of transportation."

### III.

The court erred in holding and deciding that the shipper was not bound by said livestock contract and could sue for a breach of a carrier's common law liability.

### IV.

The court erred in holding and deciding that when the shipper sued in tort for a breach of the carrier's common law liability, and the pleadings and evidence disclosed that the shipment was received and transported under and pursuant to the terms of a special livestock contract, that there was no fatal variance between the cause of action alleged and the proof.

### V.

The court erred in holding and deciding that the burden of proof is not upon the shipper to prove negligence when he or his agents accompany his stock shipped under a special contract which provides that "The Company shall not be liable for the loss or death of or injuries to the stock unless the same is caused by the negligence of said Company, its agents or employes," and also provides, "The said shipper agrees that said shipment shall be accompanied by one or more attendants, according to the rules of the Company, who shall have authority to represent the Shipper in all matters pertaining to the resting, feeding, stopping and general care and handling of the stock."

### VI.

The court erred in holding and deciding that instruction No. 24, as given by the trial court, was a proper instruction 354 on the burden of proof in said case. Said instruction reads as follows:

"The Court instructs the jury that if they find from the evidence in the case that the cattle described in the complaint, or any of them, died or were injured while in the custody and care of the defendant, and such death or injury was not the result of some inherent want of vitality, or of injuries inflicted by such cattle upon each other, or by unavoidable accident, the defendant will be liable; unless it is established by a prepondérance of the evidence that such death or injury was occasioned by some other cause than the negligence of the defendant, and in the absence of such proof the law will presume negligence on the part of the defendant."

### VII.

The court erred in not holding and deciding that paragraph 2 of said livestock contract was binding upon the shipper and that

he was thereby precluded from recovering damages for the reason that the evidence showed that whatever damages or delays there may have been arose from the inclemency of the weather and the action of the elements, the risks of damage from which he assumed, and that there was no substantial evidence to the contrary. Paragraph 2 of said contract reads as follows, to-wit:

"The Shipper assumes all risk of damage or delay to his stock arising from or incident to the inclemency of the weather and the action of the elements, knowing that said stock is liable to be exposed to danger and risk therefrom, and hereby releases the Company from all liability for damages caused thereby."

### VIII.

The court erred in not reversing the judgment of the trial court and in not upholding the rights of the plaintiff in error under the said statutes of the United States and sustaining the validity of the contract of shipment executed under the authority conferred by said statutes.

Wherefore, plaintiff in error prays that for the errors aforesaid and other errors appearing in the record of the said Supreme Court in said cause to its prejudice that the said judgment be reversed.

C. W. BUNN,  
CHARLES DONNELLY,  
GUNN & RASCH,  
E. M. HALL,  
*Attorneys for Plaintiff in Error.*

355 & 356 [Endorsed:] No. 3439. In Supreme Court of State of Montana. R. P. Wall, as administrator, etc., Defendant in Error, — Northern Pacific Railway Co., Plaintiff in Error. Assignment of Errors. Filed January 26, 1915. John T. Athey, Clerk, — — —, Deputy. — — —, Attorneys for —.

357 In the Supreme Court of the State of Montana.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased, Defendant in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error.

*Petition for Writ of Error.*

To the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana:

The petition of Northern Pacific Railway Company, a corporation, plaintiff in error herein, respectfully shows that on the 18th day of December, 1914, the Supreme Court of the State of Montana, in this case rendered judgment against your petitioner Northern Pacific Railway Company, and thereafter a petition for

rehearing was filed, presented, considered and on the 6th day of January, 1915, denied by this court, whereupon said judgment became final, as will appear by reference to the record in said cause and that the said Supreme Court is the highest court in said state in which a decision in said cause can be had.

That this is an action brought under and controlled by the statutes of the United States relating to Interstate Commerce and particularly by the Act of Congress of June 29, 1906, amending an Act of Congress entitled, "An Act to Regulate Commerce," approved February 4, 1887.

That under said statutes your petitioner claims the right to enter into contracts with shippers over its line of railroad and that of connecting carriers from points in one state to points 358 in another state and to incorporate in said contracts certain conditions to be performed by said shippers and to limit its liabilities under certain circumstances; that by this action there was drawn in question the construction of certain of said statutes of the United States and the validity of contracts executed thereunder relating to interstate shipments and the decision of this court is against the said rights claimed by the Northern Pacific Railway Company and it believes contrary to the statutes of the United States relating to and governing shipments and contracts for shipments in Interstate Commerce and that the said Supreme Court, in holding and deciding as aforesaid, committed error to the prejudice of your petitioner as will in more detail appear from the assignments of error filed with this petition.

Wherefore, your petitioner prays the allowance of a writ of error, returnable in the Supreme Court of the United States, and for citation; and your petitioner will ever pray, etc.

C. W. BUNN,  
CHARLES DONNELLY,  
GUNN & RASCH,  
E. M. HALL,  
*Attorneys for Petitioner.*

It is ordered by this Court that a writ of error be allowed as prayed for in the foregoing petition, provided, however, that the said Northern Pacific Railway Company, plaintiff in error, give bond according to law in the sum of \$1,500.00 which said bond shall operate as a supersedeas bond.

Dated this 26 day of January, 1915.

THEODORE BRANTLY,  
*Chief Justice of the Supreme Court  
of the State of Montana.*

359 & 360 [Endorsed:] No. 3439. In Supreme Court State of Montana. R. P. Wall, as Administrator, etc., Defendant in Error, — Northern Pacific Railway Co., Plaintiff in Error. Petition for Writ of Error. Filed January 26, 1915. John T. Athey, Clerk. — Deputy. — — — Attorneys for

361 In the Supreme Court of the State of Montana.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased,  
Defendant in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff  
in Error.

*Bond.*

Know all men by these presents: That the Northern Pacific Railway Company, as principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto R. P. Wall, as Administrator of the Estate of R. J. Wall, Deceased, in the sum of \$1,500.00, to be paid by said obligee, for which payment well and truly to be made they bind themselves and their, and each of their successors and assigns jointly and severally by these presents.

Dated this 26th day of January, 1915.

Whereas, the above named Northern Pacific Railway Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Montana:

Now therefore, the condition of this obligation is such that if said Northern Pacific Railway Company shall prosecute such writ of error to effect, and answer all costs and damages that may be adjudged if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY CO.,

By GUNN & RASCH, Attorney.

NATIONAL SURETY CO.,

[SEAL.] By W. K. ARMSTRONG,

*Its Attorney in Fact.*

[Internal revenue stamp 5 cents.]

I hereby approve the foregoing bond and surety this 26th day of January, 1915.

THEODORE BRANTLY,  
*Chief Justice of the Supreme Court  
of the State of Montana.*

363 In the Supreme Co<sup>r</sup>t of the State of Montana.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased,  
Defendant in Error,  
vs.  
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff  
in Error.

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the  
Justices of the Supreme Court of the State of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition  
of the judgment of a plea which is in the said Supreme Court of  
the State of Montana, before you, or some of you, being the highest  
court of law or equity of the said state in which a decision could be  
had in the said suit between R. P. Wall, as Administrator of the  
Estate of R. J. Wall, deceased, plaintiff and defendant in error,  
and Northern Pacific Railway Company, defendant and plaintiff  
in error, wherein was drawn in question the construction of a statute  
of the United States and the validity of contracts executed under  
and pursuant to said statute, and the decision was against the title,  
right, privilege or exemption specially set up or claimed under such  
statute; a manifest error hath happened to the great damage of the  
said Northern Pacific Railway Company as by its complaint ap-  
pears.

We being willing that error, if any hath been, should be  
364 duly corrected, and full and speedy justice done to the parties  
aforesaid in this behalf, do command you, if judgment be  
given therein, that then under your seal, distinctly and openly, you  
send the record and proceedings aforesaid, with all things con-  
cerning the same, to the Supreme Court of the United States, to-  
gether with this writ, so that you have the same in the said Supreme  
Court at Washington with- sixty days from the date hereof, to be  
then and there held, with the record and proceedings aforesaid being  
inspected, the said Supreme Court may cause further to be done  
therein to correct that error, what of right and according to the  
laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the  
United States, the 26th day of January, in the year of our Lord one  
thousand nine hundred and fifteen.

[Seal United States District Court, District of Montana. 1890.]

GEO. W. SPROULE,  
*Clerk of the United States District  
Court for the District of Montana.*

365 [Endorsed:] No. 3439. In Supreme Court, State of Montana. R. P. Wall, as Administrator of Estate of R. J. Wall, Deceased, Defendant in Error, vs. Northern Pacific Railway Company, Plaintiff in Error. Writ of Error. Filed Jan. 26, 1915. John T. Athey, Clerk Supreme Court, State of Montana.

366 In the Supreme Court of the State of Montana.

R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased,  
Defendant in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff  
in Error.

*Citation.*

UNITED STATES OF AMERICA, *ss.*:

To R. P. Wall, as Administrator of the Estate of R. J. Wall, Deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Montana, wherein Northern Pacific Railway Company, a corporation, is plaintiff in error, and you, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana, this 26<sup>th</sup> day of January, in the year of our Lord one thousand nine hundred and fifteen.

THEODORE BRANTLY,  
*Chief Justice of the Supreme Court  
of the State of Montana.*

[Seal Supreme Court, State of Montana.]

Attest:

JOHN T. ATHEY,  
*Clerk of the Supreme Court of the State of Montana.*

367 Service of the foregoing Citation admitted and receipt of a copy thereof acknowledged this 28th day of January, 1915.

WALTER AITKEN,  
*Attorney of Record for R. P. Wall, as  
Administrator of the Estate of R. J.  
Wall, Deceased.*

368 [Endorsed:] In Supreme Court, State of Montana. R. P. Wall, as Administrator of Estate of R. J. Wall,

Deceased, Defendant in Error, vs. Northern Pacific Railway Company, Plaintiff in Error. Citation. Filed Jan. 29, 1915. John T. Athey, Clerk Supreme Court, State of Montana.

## 369 STATE OF MONTANA,

*Office of the Clerk of the Supreme Court, ss:*

I, John T. Athey, Clerk of the Supreme Court of th- State of Montana, do hereby certify that the foregoing is a complete and true transcript of the record in the case of R. P. Wall, as administrator of the Estate of R. J. Wall, Deceased, Defendant in Error, vs. Northern Pacific Railway Company, a Corporation, Plaintiff in Error, consisting of copy of the transcript on appeal of said case to the Supreme Court of Montana, containing pages 1 to 330, inclusive and index, also copy of the opinion of the Supreme Court filed on December 18, 1914, copy of minute entries of the court, copy of the petition for rehearing, copy of the minute entry denying said petition, the petition for writ of error, the order allowing said petition the assignments of error and copy of the bond filed and approved all as appear from the papers, records and proceedings in said cause on file in my office.

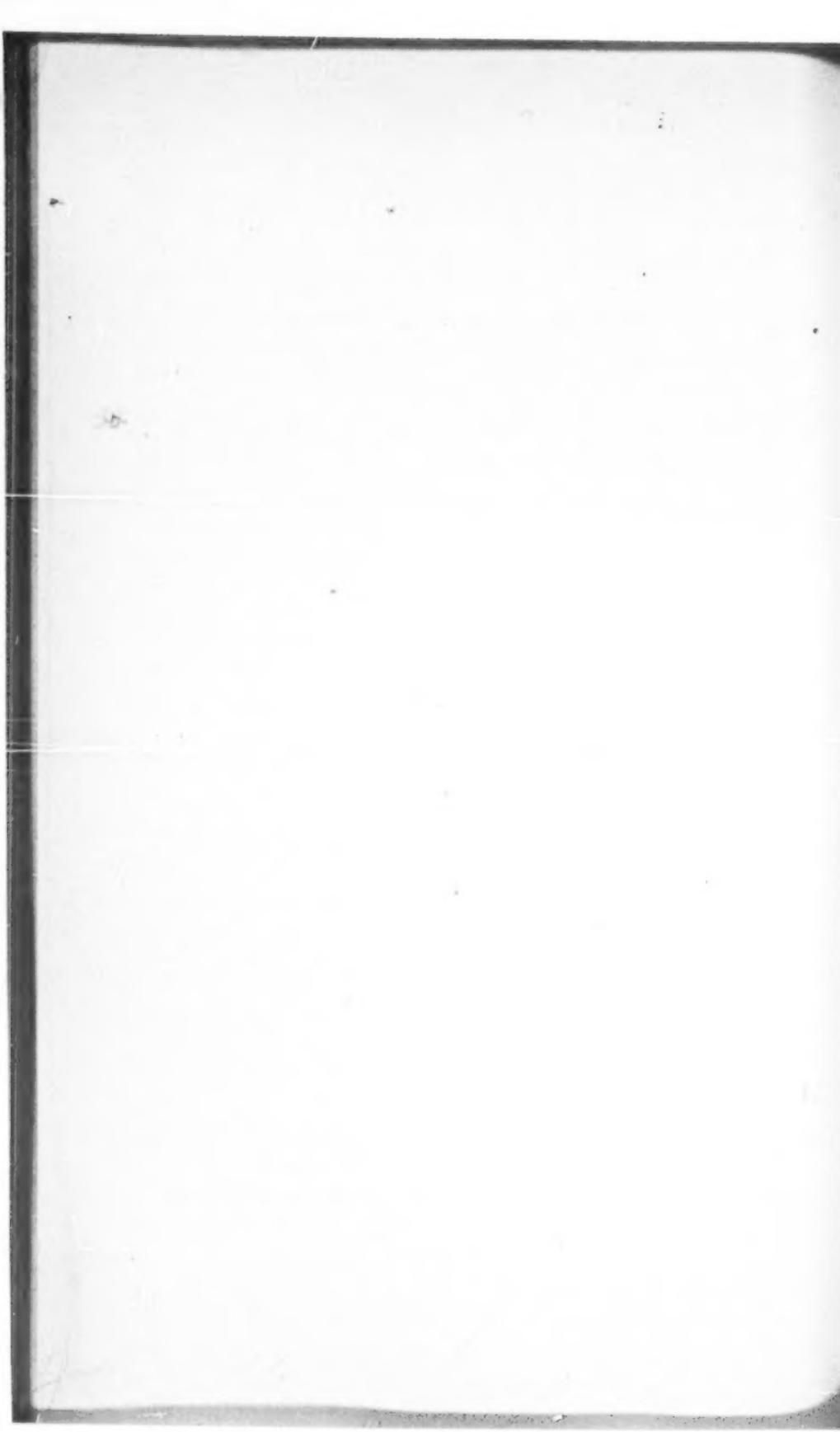
And I further certify that there is attached to said transcript of the record the writ of error and citation issued in said cause which, together with said transcript and assignments of errors, are transmitted to the Supreme Court of United States in obedience to the command of said writ.

Witness my hand and the seal of said court this 29th day of January, 1915.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,  
*Clerk of the Supreme Court of the State of Montana.*

Endorsed on cover: File No. 24,559. Montana Supreme Court. Term No. 350. Northern Pacific Railway Company, plaintiff in error, vs. R. P. Wall, as administrator of the estate of R. J. Wall, deceased. Filed February 13th, 1915. File No. 24,559.



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JAMES D. MAHER

CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 350.

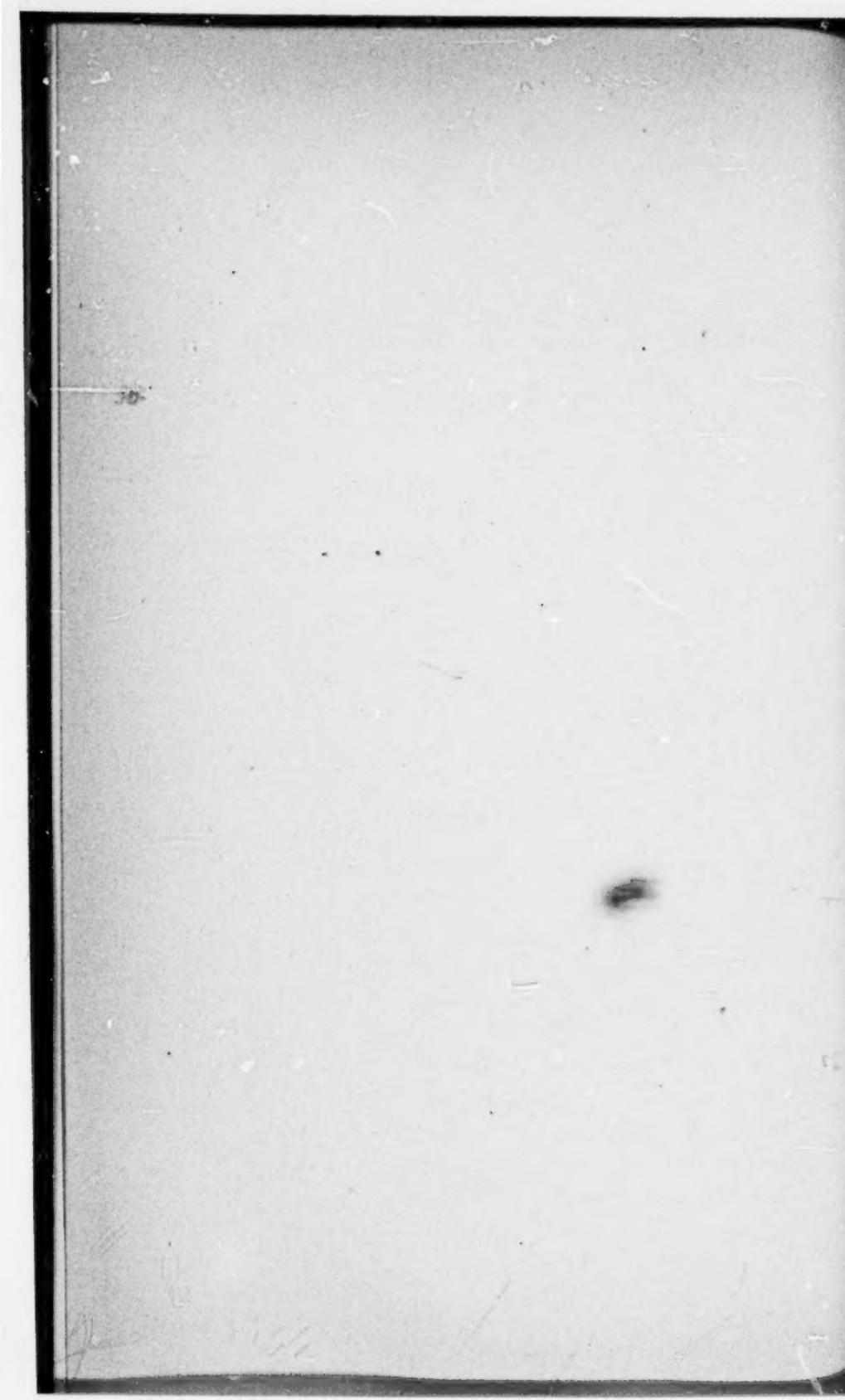
NORTHERN PACIFIC RAILWAY COMPANY,  
*Plaintiff in Error,*

vs.

R. P. WALL, as Administrator of the Estate of R.  
J. WALL, Deceased,

BRIEF OF PLAINTIFF IN ERROR.

CHARLES DONNELLY.



# Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 350.

NORTHERN PACIFIC RAILWAY COMPANY,  
*Plaintiff in Error,*

vs.

R. P. WALL, as Administrator of the Estate of R.  
J. WALL, Deceased,

## STATEMENT.

On January 2, 1912, plaintiff below delivered to the Northern Pacific Railway Company, at Belgrade, Montana, 101 head of cattle to be carried to Chicago. They were received and carried at a reduced rate, (R. 69, 76, 153) under a contract similar to those involved in *C. B. & Q. Ry. Co. v. Miller*, 226 U. S. 513, and *C. St. P. M. & O. Ry. Co. v. Latta*, 226 U. S. 519. The shipper routed them via the Northern Pacific Railway to Minnesota Transfer, and thence via the Chicago, Burlington & Quincy Railroad to destination. The contract contained, among others, the following provisions (R. 154) :

"6. The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

"9. The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said company, to which the said property may come for purpose of transportation."

The cattle were delivered at Chicago, January 15, 1912. No notice of any claim that they ~~were~~ <sup>ever</sup> injured or that he had been damaged, was ~~made~~ <sup>given</sup> by the plaintiff until some time after they had been sold and dispersed.

In July, 1912, he began this action against the Northern Pacific Company alone, alleging that it had negligently delayed the transportation of the cattle, and had otherwise been guilty of negligence, not only between stations on its own line but as well between stations on the line of the Burlington Company. (R. 2.) The defendant answered, setting up the provisions of the contract above quoted, the fact that the shipment was an interstate shipment governed by the Act to Regulate Commerce, and averring that plaintiff had given no notice of any claim. (R. 5, 6.) Plaintiff replied admitting (R. 9) that he did not comply with the provisions of the contract relating to notice of claim, but insisting that those provisions had been waived by defendant. Replying further to a clause of the contract professing to restrict the liability of the

defendant to damage occurring on its own line—a clause, let it be observed, which defendant had not referred to or relied upon in its answer—plaintiff alleged that this clause was contrary to the provisions of Section 20 of the Act to Regulate Commerce, as amended June 29, 1906, and he set forth in terms the provision known as the Carmack Amendment. (R. 8.) On the trial he introduced evidence to prove the negligence of the Burlington Company, (R. 28, 29) and the Court submitted the case to the jury under instructions allowing them to hold the Northern Pacific Company liable, not only for its own negligence, but as well for that of the connecting carrier. (R. 138-141.) It instructed them (R. 142, Instructions 20 and 21) that the provisions of the contract requiring notice was a reasonable one and that plaintiff could not recover unless defendant had waived it, but that it might be waived impliedly or expressly.

Plaintiff had a verdict and the defendant appealed to the Supreme Court of Montana. That court held that the reasonableness of the provision requiring notice was to be tested by the facts in the case; that by its terms the provision required notice to be given to some officer or station agent of the initial carrier; that notice to an agent of the Burlington Company, the connecting carrier, "would not have been effective for any purpose"; and that as the eastern terminus of the Northern Pacific Company at St. Paul, was four hundred miles from the destination of the shipment at Chicago, the provision was unreasonable and the fail-

ure of the plaintiff to give notice in accordance with it was no defense. (R. 166.) The defendant moved for rehearing, (R. 170-175) directing the attention of the court to the fact that the effect of the Carmack Amendment, upon which the action was grounded, was to make the connecting carrier merely the agent of the initial carrier, and therefore to make notice to it notice to the initial carrier. The motion was denied; (R. 176) whereupon this writ of error was sued out.

#### ASSIGNMENTS OF ERROR.

1. The court erred in holding and deciding that paragraph 6 of the livestock contract, under which the stock were shipped from the State of Montana to the State of Illinois, was unreasonable and not binding upon the shipper, thereby denying plaintiff in error certain rights and privileges given it under the Act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce," and amendments thereto.
2. The court erred in holding that notice to an agent of the Burlington Company would not have been effective for any purpose.

## ARGUMENT.

### I.

The defendant in error has moved to dismiss on the ground that no Federal question is involved. The motion, we think, is obviously without merit. The case by its pleadings, its evidence, and the court's instructions, was made to rest squarely upon the Carmack Amendment (Sec. 7, c. 3591, 34 Stat. 584, 595); and in consequence of that amendment he was allowed, in an action *against the initial carrier alone*, to prove and to recover for the negligence of a connecting carrier. If the effect of that amendment is to make the connecting carrier, and therefore its agents, the agents of the initial carrier, we surely may come to this court with the question whether the Supreme Court of Montana was right in saying that "notice to an agent of the Burlington Company would not have been effective for any purpose," and that because no officer or station agent primarily employed by the Northern Pacific Railway Company was shown to have been at Chicago, this clause of the contract was unreasonable and inoperative. Such a question is a Federal question of the plainest and most elementary character; it was necessarily involved at every step of the proceedings, and this court has a clear right to review the decision of it.

## II.

When the Carmack Amendment was first considered in *Atlantic Coast Line Railroad Company v. Riverside Mills*, 219 U. S. 186, this court said:

"The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce and 'receiving property for transportation from a point in one state to a point in another state' as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents."

It said again:

"Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence."

And again:

"But it is said that the act violates the Fifth Amendment by taking the property of the initial carrier to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss. But this contention results from a surface reading of the act and misses the true basis upon which it rests. The liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents.

"In substance Congress has said to such carriers, 'If you receive articles for transportation from a point in one state to a place in another,

beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents and not as agents of the shipper.' It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

In *Galveston, Harrisburg &c. Railway Company v. Wallace*, 223 U. S. 481, the court said:

"Under the Carmack amendment, as already construed in the *Riverside Mills Case*, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract. It thereby elects to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents."

It was upon this law thus construed, that plaintiff below rested his case. In asserting that the initial carrier was liable for the negligence of the connecting carrier, he asserted necessarily that the connecting carrier was its agent and—as a corporation can act only through its agents—that its

agents were the agents of the initial carrier. Can he under such circumstances, be permitted to play both fast and loose—to assert their agency for the purpose of holding the initial carrier liable for their negligence, and deny it for the purpose of escaping the obligations of the contract under which his shipment moved?

It is obvious, and we do not understand counsel to deny, that plaintiff could not have recovered from the Burlington Company. To any action brought against that company it would have been a complete answer to set up the clause requiring notice to be given and the failure to give it. This is so not only because the contract provided that its terms, conditions and limitations should "enure to the benefit of each and every carrier," but as well because under the Carmack Amendment such a provision enures to the benefit of the connecting carrier whether the contract expressly provides that it shall or not. This Court expressly said so in *Kansas City Southern Company v. Carl*, 227 U. S. 639, 648. The plaintiff then could not have recovered from the Burlington Company directly; yet this decision, if it stands, will allow him by indirection to accomplish that very thing. The Act expressly gives to the initial carrier a right to recover from the connecting carrier the amount of any loss, damage or injury it may have been required to pay the shipper; and as was pointed out by counsel representing the railroad company in the *Riverside Mills* case, the connecting carrier "is bound by the judgment, without notice."

The court below cites and relies on *Missouri Pacific Company v. Harris*, 67 Texas, 166, and *Baxter v. L. N. A. & C. R. Co.*, 165 Ill. 78, where it was held that because the place of delivery was beyond the line of the initial carrier, in another State, "no presumption can arise that the carrier had an officer or station agent near the place of destination," and therefore that the provision was unreasonable and inoperative. But both these cases were decided long before the adoption of the Carmack Amendment; and since that amendment the courts have held repeatedly that notice to an agent of the connecting carrier is notice to the initial carrier; *Chicago &c. Railway Company v. Linger*, 156 Southwestern 298; *Overton v. Chicago &c. Railway Company*, 160 Southwestern 111; *Galveston &c. Railway Company v. Itule*, 172 Southwestern 1123.

In the *Linger case, supra*, the Court of Civil Appeals of Texas said:

"The effect of the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]) is to abolish the stipulation for separate liability of connecting carriers of interstate freight, and to make any one carrier liable by action brought against it for the negligence of any or all of such carriers over which the shipment upon which the suit is based passed, and under the provisions of the act we think notice to either of the connecting carriers of loss or damage to the live stock in this case is notice to all."

The Court will bear in mind that, given an agent reasonably accessible on whom notice can be served,

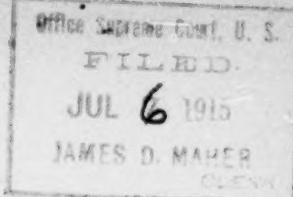
the clause under consideration is not of doubtful validity. Indeed as counsel say in their argument in support of the motion to dismiss, the court below recognizes that under such circumstances it is valid. It says (R. 166) that "its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end to keep them separate until such investigation was made." Considering the character of the shipment, and that it was being carried in mid-winter from the Rocky Mountains to Chicago, such a requirement was surely not unreasonable, and courts have almost uniformly said so. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302; *Atchison T. & S. F. Ry. Co. v. Baldwin*, 53 Colo. 416; *Mobile & O. R. Co. v. Brownsville &c. Co.*, 123 Tenn. 298; *Southern Railway Co. v. Tollerson*, 129 Ga. 647; *Hatch v. Minneapolis, St. Paul, etc., Ry. Co.*, 15 No. Dak. 490; *Atchison, etc., Ry. Co. v. Coffin*, 13 Ariz. 144; *Central of Georgia Ry. Co. v. Henderson*, 152 Ala. 203; *McElvain v. St. Louis, etc., Ry. Co.*, 151 Mo. App. 126; *Cooke v. Northern Pacific Railway Co.*, 22 No. Dak. 266.

This writ was sued out previous to the passage of the Act of Congress approved March 4, 1915, known as the Cummins Amendment. That Act amends the Carmack Amendment and makes unlawful any clause in a live stock contract or bill of lading providing for notice of less than ninety days. Undeniably this diminishes the importance of the

question here involved, but it is by no means unimportant even now. The clause in question was a standard clause appearing in the forms of nearly all carriers, and it is safe to say that ninety per cent of the live stock moved since the adoption of the Carmack Amendment has moved subject to it. If this judgment is affirmed, then upon all similar stock shipments made within the respective periods prescribed in the various jurisdictions for the commencement of actions, carriers are exposed to similar claims whether the required notice was given or not.

CHARLES DONNELLY.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

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No. 350.

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NORTHERN PACIFIC RAILWAY COMPANY,  
PLAINTIFF IN ERROR,

vs.

R. P. WALL, AS ADMINISTRATOR OF THE ESTATE OF R. J.  
WALL, DECEASED, DEFENDANT IN ERROR.

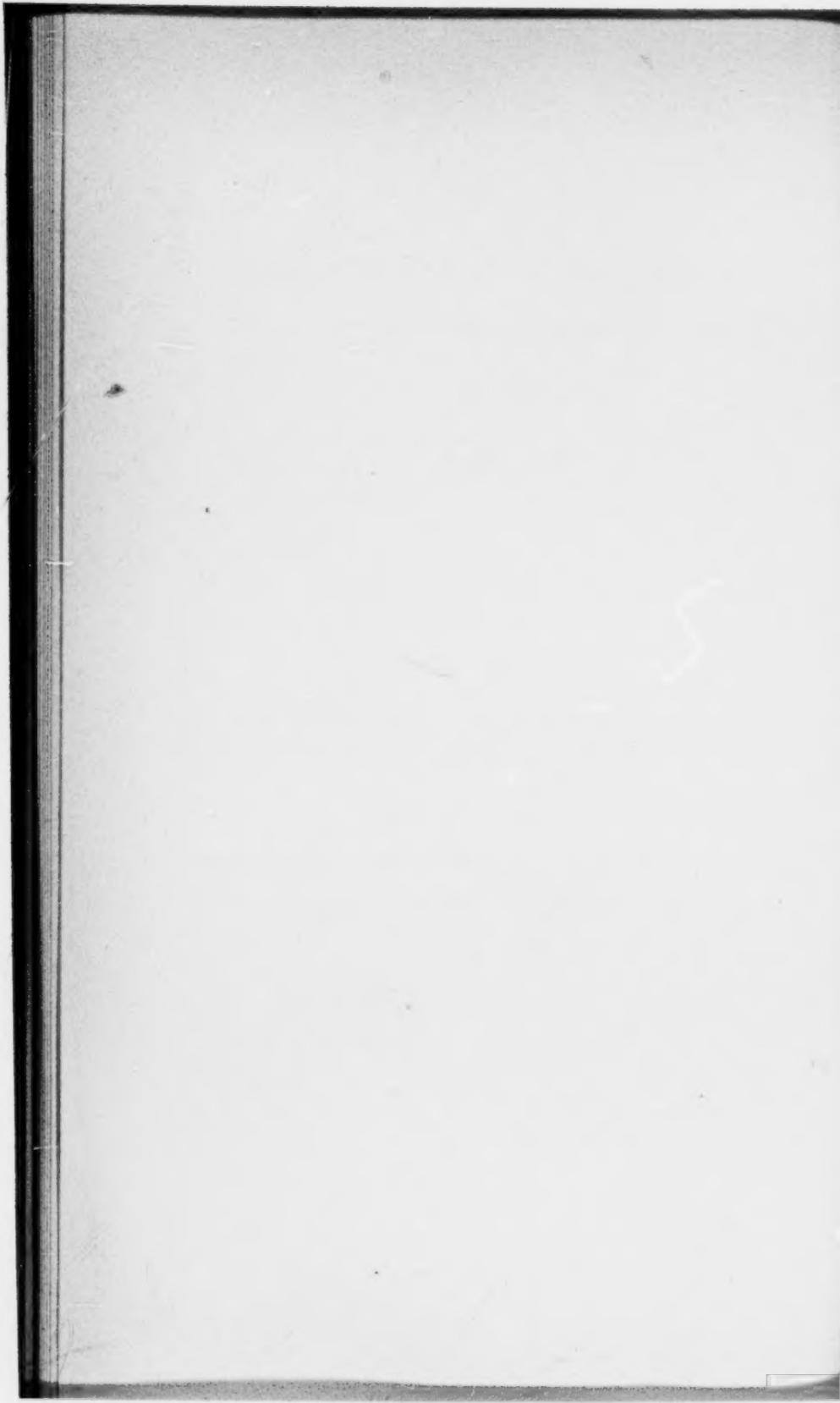
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MOTION TO DISMISS OR AFFIRM OR TRANSFER TO  
SUMMARY DOCKET.

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WALTER AITKEN,  
*Attorney for Defendant in Error.*

THOMAS J. WALSH,  
*Of Counsel.*



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ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Supreme Court of the State of Montana, upon the ground that it is manifest that this writ of error was taken for delay only.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or affirm, because the case is of such a character as not to justify extended argument.

WALTER AITKEN,  
*Of Belgrade, Montana,*  
*Attorney of Record for Defendant in Error.*

T. J. WALSH,  
*Of Helena, Montana,*  
*Of Counsel.*

**NOTICE OF MOTION.**

The plaintiff in error is hereby notified that the defendant in error will on the 11th day of October, 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record, all of which are now herewith served upon you.

WALTER AITKEN,  
*Of Belgrade, Montana,*  
*Attorney of Record for Defendant in Error.*

T. J. WALSH,  
*Of Helena, Montana,*  
*Of Counsel.*

Copy of foregoing motion and notice, together with statement of facts, points and authorities and argument, received this 28th day of June, 1915.

C. W. BUNN,  
CHARLES DONNELLY,  
GUNN & RASCH,  
E. M. HALL,  
*Attorneys of Record for Plaintiff in Error.*

### STATEMENT OF THE CASE.

On the 2d day of January, 1912, R. J. Wall delivered to Northern Pacific Railway Company, plaintiff in error, at Belgrade, Montana, on the main line of said railway, 101 head of beef cattle for transportation to Union Stock Yards, Chicago, via the line of plaintiff in error to St. Paul, Minnesota, and thence via the line of Chicago, Burlington & Quincy Railroad to destination. The cattle did not reach their destination until January 15, 1912, and this action was instituted in the District Court of the Ninth Judicial District of the State of Montana in and for the county of Gallatin against plaintiff in error as the initial carrier, to recover damages resulting from delay in transportation alleged to be due to the negligence of plaintiff in error. The complaint declared upon the common-law liability of the carrier. Plaintiff in error answered, setting up, among other defenses, a certain special contract under which the cattle were shipped, alleging that the provisions of said special contract had been "established, made and prescribed as just and reasonable terms and regulations for the handling, transportation and delivery of interstate shipments of livestock, pursuant to the authority conferred upon it by virtue of and pursuant to the authority conferred upon it by section 7 of an act of Congress, entitled 'An act to create a commerce court' and to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, as heretofore amended, and for other purposes." Plaintiff in error relied especially upon the provision of the contract (par. 6) relating to notice of claim for damages, which reads as follows:

"The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

There was also a general denial of any negligence on the part of plaintiff in error in the transportation of said livestock.

Defendant in error replied, admitting the execution of the special contract referred to, that it contained the provision quoted above and that he had not complied therewith, but alleging that said provision

\* \* \* "is unreasonable, unjust, burdensome, against the policy of the law, and contrary to the express provisions of chapter 138 of the Session Laws of the State of Montana for 1909."

In the judgment of defendant in error the foregoing summary of the pleadings is all that it is necessary to set forth herein for the purposes of this motion.

There was no appearance whatever by the C., B. & Q. Railroad Company, the connecting carrier from St. Paul.

There was trial and judgment for defendant in error, motions for nonsuit and directed verdict by plaintiff in error having been overruled, as was likewise its motion for a new trial. Plaintiff in error appealed to the Supreme Court of Montana, where the judgment of the lower court was affirmed.

Wall *vs.* Northern Pac. Ry., 50 Mont., 145 Pac., 291.

Plaintiff in error has brought the case here, making the following

#### **Assignments of Error.**

##### **I.**

That said court erred in holding and deciding that paragraph 6 of the livestock contract, under which the stock were shipped from the State of Montana to the State of Illinois, was unreasonable and not binding upon the shipper,

thereby denying plaintiff in error certain rights and privileges given it under the act of Congress of February 4, 1887, entitled, "An act to regulate commerce," and amendments thereto. Paragraph 6 of said contract, reads as follows, to wit:

"6. The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

## II.

That said court erred in so holding and deciding that said paragraph 6 of said livestock contract was unreasonable and not binding upon the shipper when read in connection with paragraph 9 of said contract, which reads as follows, to wit:

"9. The terms, conditions, and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said company, to which the said property may come for purpose of transportation."

## III.

The court erred in holding and deciding that the shipper was not bound by said livestock contract and could sue for a breach of a carrier's common-law liability.

## IV.

The court erred in holding and deciding that when the shipper sued in tort for a breach of the carrier's common-law liability, and the pleadings and evidence disclosed that the shipment was received and transported under and pur-

suant to the terms of a special livestock contract, that there was no fatal variance between the cause of action alleged and the proof.

#### V.

The court erred in holding and deciding that the burden of proof is not upon the shipper to prove negligence when he or his agents accompany his stock shipped under a special contract which provides that "The company shall not be liable for the loss or death of or injuries to the stock unless the same is caused by the negligence of said company, its agents or employees," and also provides, "The said shipper agrees that said shipment shall be accompanied by one or more attendants, according to the rules of the company, who shall have authority to represent the shipper in all matters pertaining to the resting, feeding, stopping, and general care and handling of the stock."

#### VI.

The court erred in holding and deciding that instruction No. 24, as given by the trial court, was a proper instruction on the burden of proof in said case. Said instruction reads as follows:

"The court instructs the jury that if they find from the evidence in the case that the cattle described in the complaint, or any of them, died or were injured while in the custody and care of the defendant, and such death or injury was not the result of some inherent want of vitality, or of injuries inflicted by such cattle upon each other, or by unavoidable accident, the defendant will be liable: unless it is established by a preponderance of the evidence that such death or injury was occasioned by some other cause than the negligence of the defendant, and in the absence of such proof the law will presume negligence on the part of the defendant."

## VII.

The court erred in not holding and deciding that paragraph 2 of said livestock contract was binding upon the shipper and that he was thereby precluded from recovering damages for the reason that the evidence showed that whatever damages or delays there may have been arose from the inclemency of the weather and the action of the elements, the risks of damages from which he assumed, and that there was no substantial evidence to the contrary. Paragraph 2 of said contract reads as follows, to wit:

"The shipper assumes all risks of damage or delay to his stock arising from or incident to the inclemency of the weather and the action of the elements, knowing that said stock is liable to be exposed to danger and risk therefrom, and hereby releases the company from all liability for damages caused thereby."

## VIII.

The court erred in not reversing the judgment of the trial court and in not upholding the rights of the plaintiff in error under the said statutes of the United States and sustaining the validity of the contract of shipment executed under the authority conferred by said statutes.

### ARGUMENT.

The contention of the defendant in error on this motion is that the assignments of error, in the light of the record, present no Federal question in view of which the revisory power of this court can be invoked. If there is any such question it is covered by assignments of error numbers one and two.

It is true that the answer sets up a claim that the act of Congress referred to justifies the incorporation in the special contract of transportation of the clause requiring notice of claim. But the opinion of the Montana court concedes the validity of the limitation prescribed by the clause in question; merely asserting that the defendant appealing to it must, and that the plaintiff in error did not, bring itself by appropriate pleadings and proof within the spirit of the clause. The opinion says:

"There is not a suggestion in the contract, in the pleading or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of the road—more than 400 miles away."

It is unnecessary to enter upon any inquiry as to whether the clause of the contract must depend for its validity upon the Federal statute appealed to, or whether the general law justifies it, for the court admits its vitality. It holds, however, that the clause cannot be construed to require notice to be given to a station agent when there is none within a distance of four hundred miles. It is not applicable to such conditions as are shown to exist. The court's decision turned upon the construction to be given to the important clause in the contract, not upon the construction which should be given to the statute. The court held, indeed, that the burden was upon the plaintiff in error to show that there was a station agent within a reasonable distance to whom notice

could be given, but that was not important to the decision, because it appears that there was not. If the clause had provided that notice must be given though there should be no agent within four hundred miles or some other reasonable distance, the question would then arise as to whether the statute justifies such a provision, for certainly the common law does not. On that question the case might be set down for summary hearing, for such an unreasonable contention ought not to be entitled to protracted debate. But even such a shadowy claim cannot be urged, for the court holds that the clause in question is not to be construed as though it in terms required notice under any and all susceptible conditions, and particularly under the conditions disclosed in this case. An alleged error in the construction of a contract presents no Federal question.

Commercial Publishing Co. *vs.* Beckwith, 188 U. S., 567.

As to assignment of error number three, a reference to the opinion of the Supreme Court of Montana will disclose that there is no holding or decision by that court that the shipper was not bound by the provisions of the special contract. On the contrary, in so far as the Montana court construes the contract at all, the holding is that the special contract, when supported by appropriate pleading and proof as to reasonableness, is in all of its provisions valid and binding upon the shipper and operates to limit the common-law liability of the carrier within the scope of its terms.

Assignments of error numbers IV, V, VI, VII, and VIII do not, it is respectfully submitted, raise any Federal question whatever. All of them relate to the holding and decision of the Montana Supreme Court upon general principles of law or questions of fact; all of which, as held by this court in many cases, are foreclosed in this case by the decision already rendered.

## As to decisions on general principles of law:

Arkansas So. Ry. Co. *vs.* German Nat. Bank, 207 U. S., 270; 28 Sup. Ct., 78.  
 Western Union Tel. Co. *vs.* Wilson, 213 U. S., 52; 29 Sup. Ct., 403.  
 Sayward *vs.* Denny, 158 U. S., 489.

## As to questions of fact:

Missouri, K. & T. R. Co. *vs.* Harriman Bros., 227 U. S., 657; 33 Sup. Ct., 397.  
 Chrisman *vs.* Miller, 197 U. S., 313; 25 Sup. Ct., 468.  
 King *vs.* West Virginia, 216 U. S., 92; 30 Sup. Ct., 225.  
 Clipper Min. Co. *vs.* Eli Min. Co., 194 U. S., 220; 24 Sup. Ct., 632.  
 Smiley *vs.* Kansas, 196 U. S., 447; 25 Sup. Ct., 289.

Therefore, defendant in error respectfully submits that the present litigation, in which he has heretofore been successful at every stage, has pended for three years; that the expense and long delay incident to appellate procedure have caused great annoyance and inconvenience; that the writ of error is taken for delay only, and the contentions upon which it is claimed a Federal question depends are so apparently unfounded as not to require further argument.

Parker *vs.* McLain, 35 Sup. Ct., 632.

WALTER AITKEN,  
*Of Belgrade, Montana,*  
*Attorney for Defendant in Error.*

T. J. WALSH,  
*Of Helena, Montana, of Counsel.*

[Endorsed:] 35,015/24,559. Supreme Court of the United States, October Term, 1915. No. 815. Northern Pacific Railway Company, plaintiff in error, *vs.* R. P. Wall, as administrator of the estate of R. J. Wall, deceased, defendant in error. Motion to dismiss or affirm or transfer to summary docket. Walter Aitken, attorney of record for defendant in error; T. J. Walsh, of counsel.

[Endorsed:] Oct. 11, '15. File No. 24,559. Supreme Court U. S., October term, 1915. Term No. 350. Northern Pacific Railway Co., plff in error, *vs.* R. P. Wall, as administrator, etc. Motion to dismiss or affirm or place on summary docket, notice, and proof of service of same. Filed July 6, 1915.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 350.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

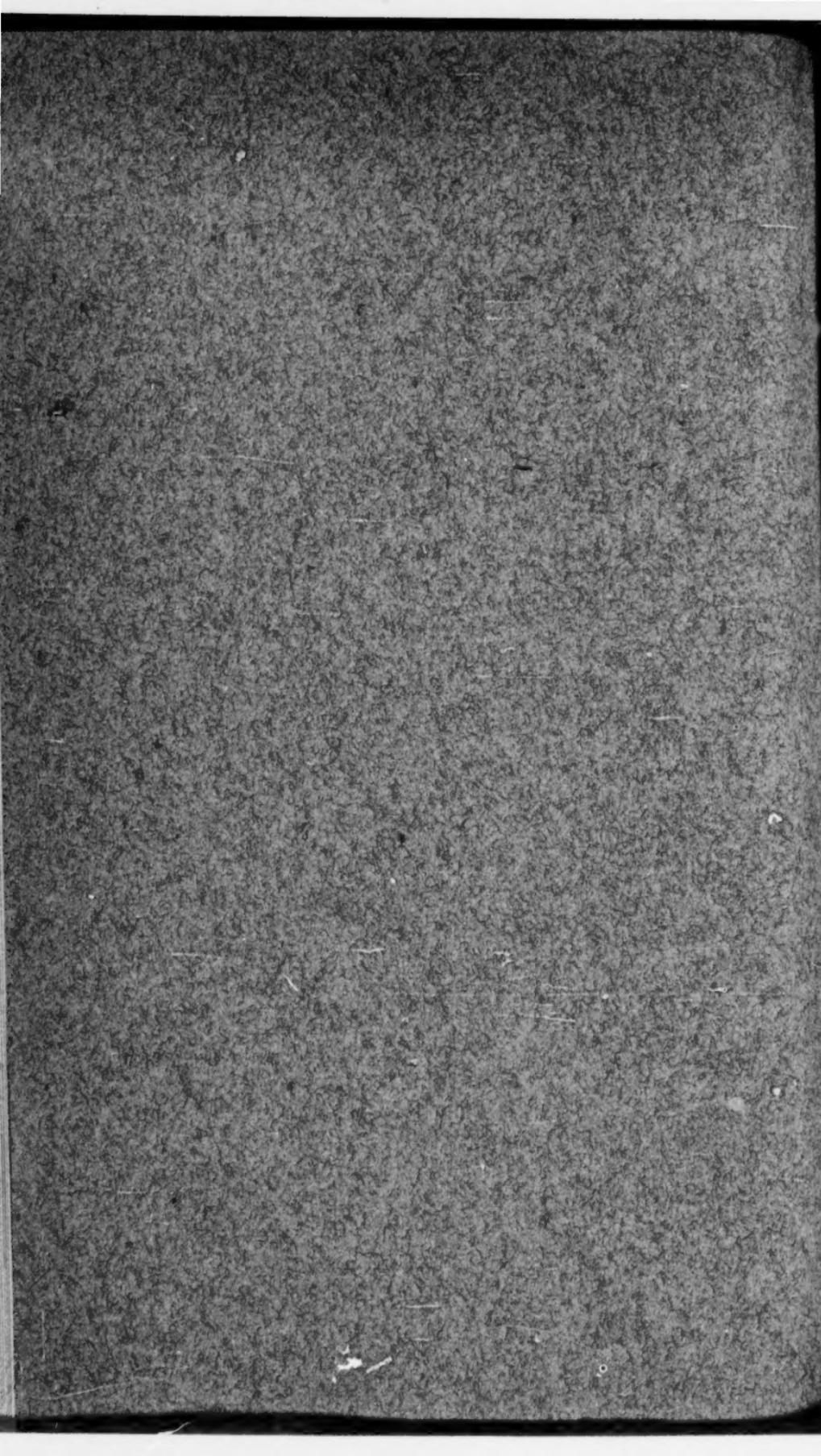
vs.

E. P. WALL, AS ADMINISTRATOR OF THE ESTATE OF R. J.  
WALL, DECEASED, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

WALTER ATKIN,  
Attorney for Defendant in Error.

THOMAS J. WALSH,  
*Of Counsel.*



# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

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## No. 350.

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NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

R. P. WALL, AS ADMINISTRATOR OF THE ESTATE OF R. J.  
WALL, DECEASED, DEFENDANT IN ERROR.

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### SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

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The defendant in error submits this brief in elaboration of the argument presented with the motion to dismiss or affirm or to advance, understanding that the order of the court leaves undetermined the question of jurisdiction presented in connection with the motion.

#### I. The Carmack Amendment as a Foundation for the Case Unimportant.

The action does, indeed, bring into the case the Carmack Amendment. In it the defendant in error seeks to recover damages of his adversary, the initial carrier, on account of

delays in a shipment of cattle occurring at various places along its line and that of a connecting carrier. The contract of shipment made with the plaintiff in error contained the following stipulation, viz:

"The said shipper further agrees that as a condition precedent to his right to recover damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of *the said company* (the plaintiff in error) before said stock has been removed from the place of destination or mingled with other stock."

Opinion of State Court, Rec., p. 165.

"*The said company*" (the Northern Pacific Railway Company) had no officer or station agent within four hundred miles of "the place of destination," the city of Chicago, where they were eventually unloaded, the nearest point where any such officer or agent could be found being at St. Paul, Minnesota.

*Id.*

The court held that in the absence of pleading and proof that there was an officer or agent of the Northern Pacific Railway Company at the place of destination to whom the notice could be given, the plaintiff in error could not defeat a recovery because such notice was not given.

Rec., pp. 165-167.

It is true that the right of the defendant in error to recover of the plaintiff in error such damages as resulted from the negligence of the connecting carrier rests upon the Carmack Amendment. But that fact, of itself, is not sufficient to present a "Federal question" authorizing a review in this court.

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under these laws, for a suit does not so arise unless it really and sub-

stantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Shulthis *vs.* McDougal, 225 U. S., 561-569.

#### **Proposition Urged Here Not Raised by the Record.**

It must appear that the State court passed upon the validity, construction or effect of the Carmack Amendment adverse to some contention with respect thereto made by the plaintiff in error, and that its judgment rests upon the conclusion reached in relation thereto.

What was the contention made by the plaintiff in error concerning the construction or effect of that law, for its validity certainly was not a subject of consideration?

It is not clearly stated, but as it is here made it is, in substance, that by virtue of the law appealed to the contract quoted, though it reads that notice is to be given to "some officer or station agent of *the said company*," that is to say, the Northern Pacific Railway Company, is to be construed as though it read to "some officer or station agent of the said company or of any connecting carrier;" or, perhaps, that by virtue of the Carmack Amendment all officers and station agents of the connecting carrier are, for the purpose of notice, officers and station agents of the Northern Pacific Railway Company.

But if any such contention was made in the State court the opinion gives no intimation of it. The court says,

"There is not a suggestion in the contract, in the pleadings, or the proof that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of the road—more than 400 miles away."

If it had been intelligently or intelligibly urged that in view of the Carmack Amendment the station agent at Chicago of the connecting carrier, the Chicago, Burlington & Quincy, or any officer of that company is *pro hac vice* an officer or

agent of the Northern Pacific, it is passing strange that the Supreme Court of Montana did not notice the claim in connection with the remark quoted.

Referring to the language of the paragraph from the shipping contract under consideration, in terms requiring that notice be given to the initial carrier, the court said:

"If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of the Northern Pacific Company. Notice to an agent of the Burlington road would not have been effective for any purpose."

The plaintiff in error could not have made it very clear to the court that it maintained that reading the Carmack Amendment into the contract it was to be construed as though it stipulated that notice might be given to either company.

As the brief of the plaintiff in error in the State court is not a part of the record, no opportunity is afforded this court to know what it claimed therein, and it is unimportant to know, because under repeated rulings it must appear that the Federal question was properly presented for review by appropriate exceptions taken below and preserved in the bill, unless it appears on the face of the judgment roll.

The answer does not suggest that notice to the Burlington's officers or station agent would have been sufficient under the contract, considering the Carmack Amendment; the motion for a nonsuit did not suggest that the action had failed for want of proof of notice to the Burlington, adequate under the Carmack Amendment (Rec., pp. 65-66). The motion for a peremptory instruction at the close of the testimony referred to the failure to give notice, but no mention was made that the Carmack Amendment was involved or that the requirement of the contract could be discharged, in view of its terms, by notice to the Burlington. It is obvious from the remarks of the trial judge that his mind was never directed to any such contention.

Rec., pp. 132-133.

No instruction was asked embodying any such principle of law and none given denying it. Exceptions to instructions are found at

Rec., pp. 133-136.

In

Mutual Life Ins. Co. *vs.* McGrew, 188 U. S., 291-308,

this court said:

"Our jurisdiction of this writ of error is asserted under the third class of cases enumerated in sec. 709, and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. *Spies vs. Illinois*, 123 U. S., 131; *Jacobi vs. Alabama*, 187 U. S., 133; *Layton vs. Missouri*, 187 U. S., 356; *Erie Railroad Company vs. Purdy*, 185 U. S., 148.

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb vs. Trustees*, 179 U. S., 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. *Sawyer vs. Denny*, 158 U. S., 180; *Zadig vs. Baldwin*, 166 U. S., 485, 488. The assertion of the right must be made unmistakably and not left to mere inference. *Oxley Stave Company vs. Butler County*, 166 U. S., 648."

Tested by the rule thus announced, there is no "Federal question" raised by this record.

It is true that

"If the highest court of a State entertains a petition for rehearing, which raises Federal questions,

and decides them, that will be sufficient; *Mallett vs. North Carolina*, 181 U. S., 589; or if the court decides a Federal question which it assumes is distinctly presented to it in some way. *Home for Incurables vs. New York*, 187 U. S., 155; *Sweringen vs. St. Louis*, 185 U. S., 38, 46."

*Id.*

But the court, as appears from its opinion, did not pass upon any such question as that suggested above, namely, as to whether the expression "said company" in the contract, plainly referring to the Northern Pacific Company, as the court states, should not, in view of the Carmack Amendment, be construed to refer to the Burlington Company as well, or whether, in view of that statute, the officers of that company and its station agents did not become for the occasion the officers and agents of the Northern Pacific Company.

### III. The Case as to Notice Turned on a Question of Pleading.

What the court did decide was that as a matter of practice the burden was on the plaintiff in error to plead and to prove not only the special contract under which it claimed to have escaped liability, but the facts showing that under the circumstances attending this particular shipment the contract was reasonable—namely, that the "said company" had either officers or station agents at the place of destination, the shipper knowing where to find them, or they being where he could have found them by reasonably diligent inquiry.

The rule of pleading in such a case is one in respect to which courts differ, some holding that the shipper is obliged to set up facts showing that under the particular circumstances of the case such a provision of a shipping contract is unreasonable, as, for instance, that there was neither station agent nor officer at the place of destination, or that the injuries were of such a character as that they could not be and were not discerned before they were taken

away or mingled with other stock. The contraction of disease through failure to disinfect contaminated cars might present such a condition. Other courts hold that the shipper relying on the exemption clause must show it to be reasonable as applied to the case in which it is relied upon.

The conflicting views are exhibited, with a reference to cases, in

4 Elliott on Railroads, 1512.

The Supreme Court of Montana aligns itself by the decision sought to be reviewed with the courts adhering to the doctrine last above referred to. The subject receives elaborate consideration in the opinion in

*Houtz vs. U. P. Ry. Co.*, 17 L. R. A., 628 (N. S.), referred to in the opinion of the Montana court. The conclusion arrived at in that case is expressed in the following language:

"The weight of authority also seems to be that, in an action where there is a plea of a special contract in defense limiting or conditioning the carrier's liability, the burden is upon the carrier, not only to show a valid special contract but also to allege and prove facts and circumstances showing the stipulation to be reasonable."

The same rule of pleading was announced in the case of

*M. P. R. Co. vs. Harris*, 61 Tex., 166,

from the opinion in which the State court quotes at length.

It is said in the brief of plaintiff in error on the motion in consequence of which this cause is set down for argument that that case was decided before the passage of the Carmack Amendment. But the authority is not weakened by reason of that fact. It simply declares the proper rule of pleading. If it was necessary before the Carmack Amendment that the carrier plead and prove the facts showing the contract to be reasonable, it certainly must do so now,

that is, if under the language of the contract the shipper was obliged to give notice or might give notice to some officer or agent of the connecting carrier, it must be averred as a part of the defense that such connecting carrier had, at the place of destination, an officer or station agent to whom notice might be given.

The Montana court may be right or it may be wrong in the rule of pleading which it prescribed in this case, for the failure to observe which it held that the plaintiff in error could not defeat a recovery under the stipulation in the contract to which it appealed, or to put it in other language, that, the plaintiff in error not having shown by its pleadings and proof that the clause in question is reasonable, it must be held unreasonable and void. But whether it was right or wrong in its ruling on a question of pleading cannot be inquired into in this court.

Referring to the answer of the plaintiff in error (Rec., p. 5), it will be seen that although the clause of the contract on which reliance is placed is set up, and (*Id.*, 6) it is averred that no notice was given, there is no averment that either the Northern Pacific or the Burlington had either an officer or a station agent at Chicago to whom notice could be given.

It was because of the want of either pleading or proof on that point that the plaintiff in error found itself unable to defeat a recovery. The conclusion of the court is expressed in this language:

"The validity of paragraph 6 above depends upon its reasonableness, and it was therefore incumbent upon the carrier to show that it was relieved by the provision of a contract valid; in this instance reasonable (*Houtz vs. Union Pac. R. R. Co.*, 33 Utah, 175; 93 Pac., 439; 17 L. R. A. (N. S.), 628, and note)."

#### IV. Waiving Question of Pleading Case is one of Construction of Contract.

But even if the conditions adverted to were not decisive, the plaintiff in error is not entitled to a review here. It is conceded, apparently, that there was no obligation to give notice to an officer or station agent of the Northern Pacific Railway, ~~in~~ the sense that persons bearing such relation to the Burlington were, for the occasion and under the true construction of the contract, representing the former company. But whether they were or were not obviously depends upon the proper interpretation to be given to the contract. It plainly says that the notice *must* be given to some officer or agent of the Northern Pacific Company. It might very easily be framed so as to require in express terms that notice should or might be given to the connecting carrier in the case of a shipment terminating beyond its own line. It chose not to do so. Unquestionably the language of the contract is the railway company's own selection. The court takes judicial notice of the fact that these shipping contracts are executed upon blanks provided by the railway company just as it takes judicial notice that insurance contracts are written upon blanks furnished by the companies taking the risk. The brief of plaintiff in error says: "The clause in question was a *standard* clause appearing in the *forms* of nearly all carriers."

Brief, p. 11.

Under these conditions the court is required to give to the provision the construction least favorable to the railway company. The cases in this court need not be referred to. They are legion.

Moreover, the clause is intended to limit and restrict the common-law liability of a common carrier, and for that reason should receive a strict construction against it.

It is an exceedingly sound doctrine for any court to an-

nounce that if the initial carrier desires to evade liability in the case of stock unloaded at their destination on the line of a connecting carrier, by a requirement of notice to an officer or agent of the latter, it should say so in plain terms and not seek to entrap the shipper by language which by its terms indicates that a notice to them would be futile, and that it should be given to an officer or agent of the initial carrier. It is expecting rather too much of the shipper, it is laying on him a burden he ought not to bear to say that he must apply the Carmack Amendment to the language of his shipping contract and from it reach the conclusion that the agents and officers of the connecting carrier are, in fact, agents and officers of the initial carrier with whom the contract was made. It is of no consequence that it has been held when the carrier was seeking to evade responsibility that he could not escape liability if notice was given to the station agent or some proper officer of the connecting carrier. In every case the contract is to be construed most favorably to the shipper.

But suppose that the court was wrong when it said "notice to an agent of the Burlington road would not have been effective for any purpose." The Carmack Amendment does not *say* that it would be. That conclusion is to be reached by a proper interpretation of the contract, it is said, in the light of the law. Every contract is interpreted in the light of the law. And the purpose of interpretation is to ascertain what the parties meant by the language they used. Did the parties mean when they said that notice should be given to "said company" to signify that notice might be given to an officer or agent of the Burlington? The court says they did not. Suppose it was wrong in that conclusion. Such an error is not reviewable here. The proper construction of a contract does not present a Federal question. If it did, it is ventured that the court properly construed the contract.

But that is neither here nor there. The case was decided

against the plaintiff in error because it had not presented the defense it attempted to assert by any proper pleading.

"To give the Supreme Court jurisdiction of a writ of error to a State court it must appear not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the case, and that it actually was decided, or that the judgment could not have been rendered without deciding it."

Adams *vs.* Russell, 229 U. S., 353.

The writ should be dismissed or the judgment affirmed.

Respectfully submitted,

WALTER AITKIN,  
*Attorney for Defendant in Error.*

THOMAS J. WALSH,  
*Of Counsel.*

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NORTHERN PACIFIC RAILWAY CO. v. WALL,  
ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 350. Argued December 1, 1915.—Decided April 24, 1916.

Laws, in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it, as if expressly referred to or incorporated therein.

A bill of lading is a contract; and, if interstate, it is to be construed in the light of the provision of the Carmack Amendment, which prescribes how it shall be issued and makes the connecting carrier the agent of the receiving carrier for the purpose of completing the transportation and delivering the goods.

Whether in construing an interstate bill of lading issued under the Carmack Amendment due effect is given to the latter is a Federal question.

A stipulation in a bill of lading of an interstate shipment of cattle that the shipper must, as a condition precedent to his right of recovery for injury to the cattle while in transit, give notice thereof in writing to some officer or station agent of the initial carrier before the cattle are removed from the place of destination or mingled with other live stock, is to be construed in the light of the Carmack Amendment making the connecting or delivering carrier agent of the initial carrier; and notice given to the station agent or officer of the former operates as notice to the latter, and the fact that there is no officer or station agent primarily employed by the initial carrier at the point of destination does not relieve the shipper from compliance with the stipulation.

50 Montana, 122, reversed.

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THE facts, which involve the right of a shipper to recover from the carrier damages for injury to cattle being transported in interstate commerce owing to delay in transit and resulting decrease in weight, are stated in the opinion.

*Mr. Charles Donnelly* for plaintiff in error.

*Mr. Thomas J. Walsh*, with whom *Mr. Walter Aitkin* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover for injuries to cattle being transported in interstate commerce, the gravamen of the complaint being that the cattle were unreasonably delayed in transit and consequently were greatly reduced in weight and emaciated in appearance.

The cattle were shipped in January, 1912, from Belgrade, Montana, to the Union Stock Yards at Chicago over two connecting railroads—the Northern Pacific and the Burlington—under a through bill of lading issued by the initial carrier. The shipment was at a reduced rate based upon the stipulations in the bill of lading. The rate and the bill of lading had been regularly established and put in force under the Interstate Commerce Act and its amendments. One stipulation was to the effect that the shipper, as a condition precedent to his right to recover for any injury to the cattle while in transit, should give notice in writing of his claim to some officer or station agent “of said company” before the cattle were removed from the place of destination or mingled with other stock; and another was to the effect that the terms of the bill of lading should inure to the benefit of any connecting carrier over whose line the cattle should

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pass in the course of their transportation. By an endorsement on the bill of lading the Burlington Company was designated as the connecting carrier. The shipment was accompanied by an attendant selected by the shipper and authorized to represent him in all matters pertaining to the general care and handling of the cattle. Upon reaching their destination the cattle were delivered by the Burlington Company to an agent of the shipper and were sold, removed and mingled with other stock before any notice was given of a claim for injury to them while in transit.

This action was brought against the initial carrier—the Northern Pacific Company—and the damages sought were for alleged injuries to the cattle while passing over both roads. In its answer the defendant set up the stipulations before named; insisted that they were established under the Interstate Commerce Act and that a Montana statute invalidating such stipulations was, as applied to bills of lading in interstate commerce, in conflict with the congressional enactment and void; alleged that no notice of any claim for injury to the cattle had been given "to any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier," until after the cattle had been removed from the place of destination and mingled with other stock, and claimed that by reason of the failure to give the stipulated notice the plaintiff was not entitled to recover. In his reply the plaintiff, while expressly admitting that he had not complied with the stipulation relating to notice, denied that it was established or effective under the Interstate Commerce Act, insisted that it was unreasonable and in contravention of the Montana statute, alleged that compliance with the stipulation had been waived by the defendant, and set forth at length and invoked the Carmack Amendment to the Interstate Commerce Act in support of the effort to recover from the initial carrier

for the injuries occurring while the cattle were on the line of the connecting carrier. Upon the trial, and after the evidence was concluded, the defendant moved for a directed verdict in its favor upon the ground that the contract embodied in the bill of lading was valid, that confessedly the notice "required by the contract" was not given, and that there was no evidence showing a waiver of the notice. The motion was denied upon the ground that under the evidence the question of waiver was for the jury, and an exception was reserved by the defendant. At its request the court in charging the jury said: "One of the defenses relied upon by the defendant is that no notice of claim for damages for loss or injury to the stock in question was given by the plaintiff to the defendant or to the connecting carrier, before the stock was removed from the place of destination or mingled with other stock. This provision of said contract is a reasonable one, binding upon the plaintiff, and under the admissions in his reply, prevents him from recovering in this action, unless you find that . . . defendant expressly or impliedly by its conduct waived the giving of said notice in accordance with this provision of the contract." The jury, evidently resolving the question of waiver against the defendant, returned a verdict for the plaintiff, and the judgment thereon was affirmed by the Supreme Court of the State. 50 Montana, 122.

From what has been said it is apparent not only that the damages sought were for injuries occurring while the cattle were being transported in interstate commerce but also that both parties relied upon the Interstate Commerce Act and its amendments—the plaintiff to sustain his right to recover for the injuries on the line of the connecting carrier and the defendant to sustain its defense based upon the stipulations in the bill of lading. And it is plain that the trial court gave controlling effect to that act and its amendments, for otherwise the instruc-

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tion upholding the validity of the stipulation for notice could not have been given, in the presence of the Montana statute (Laws 1909, c. 138) declaring such a stipulation void.

The Supreme Court, passing the question whether notice had been waived, interpreted the stipulation as requiring that the notice be given to an officer or station agent primarily employed by the Northern Pacific Company, and thereby excluding notice to an officer or station agent of the Burlington Company, and then held the stipulation unreasonable and inoperative because no officer or agent primarily employed by the Northern Pacific Company was accessible at the place of destination. Whether in so interpreting the stipulation that court gave proper effect to the Interstate Commerce Act and its amendments is the Federal question pressed upon our attention, and we think it is fairly presented by the record. The shipment being interstate, that legislation was controlling; the through bill of lading was issued under it; the pleadings show that its application was invoked; and in the answer, as also in the instruction given at the defendant's request, there was a distinct assertion that notice was not given "to any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier," which meant that the defendant was proceeding upon the theory that the stipulation, when read in connection with the Carmack Amendment, contemplated and recognized that notice to an officer or agent of the connecting carrier—the Burlington Company—would suffice.

As this court often has held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *Von Hoffman v. Quincy*, 4 Wall. 535, 550; *Walker v. Whitehead*, 16 Wall. 314, 317; *Ed-*

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*wards v. Kearzey*, 96 U. S. 595, 601. A bill of lading is a contract and within this rule. The Carmack Amendment to the Interstate Commerce Act (§ 7, c. 3591, 34 Stat. 584, 593), which was in force when this bill of lading was issued, directs a carrier receiving property for interstate transportation to issue a through bill of lading therefor, although the place of destination is on the line of another carrier; subjects the receiving carrier to liability for any injury to the property caused by it or any other carrier in the course of the transportation, and requires a connecting carrier on whose line the property is injured to reimburse the receiving carrier where the latter is made to pay for such injury. Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for the purpose of completing the transportation and delivering the property. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 196, 206; *Galveston &c. Ry. v. Wallace*, 223 U. S. 481, 491. This bill of lading was issued under that statute and should be interpreted in the light of it. *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 593. The shipment was to pass over both roads in reaching its destination; the delivery at that place was to be made, as in fact it was, by an officer or station agent of the connecting carrier; and the stipulated notice was to be given before the cattle were removed from the place of destination or mingled with other stock, that is, while it was yet possible from an inspection of them to ascertain whether the claim of injury, if any, was well founded. In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose and gives

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due effect to the statute under which it was issued. True, the words "said company" in the stipulation, if read only in connection with an introductory sentence in the bill of lading, would seem to refer to the initial carrier alone, but when they are read in connection with the statute and other parts of the bill of lading, including the provision that its terms and conditions "shall inure to the benefit of" any connecting carrier, it is apparent that they embrace the carrier making the delivery as well as the initial carrier, especially as the former is in legal contemplation the agent of the latter.

The act of March 4, 1915, c. 176, 38 Stat. 1196, altering the terms of the Carmack Amendment is without present bearing, because passed long after this shipment was made.

We are of opinion that the Supreme Court of the State failed to give proper effect to the Carmack Amendment in interpreting the bill of lading and that the judgment should be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Judgment reversed.*

MR. JUSTICE McREYNOLDS with whom MR. JUSTICE MCKENNA concurred, dissenting.

For two reasons I am unable to agree with the opinion of the court.

*First.* If reiteration can establish a rule of law, it must be taken as settled that in causes coming here by writs of error from state courts of last resort we may not consider Federal questions not specially set up below. And further, that such a question comes too late if raised for the first time after final decision in the highest state court by petition for rehearing unless this was actually entertained. *St. Louis & San Francisco R. R. v. Shepherd*, 240 U. S. 240, 241; *McCorquodale v. Texas*, 211 U. S. 432, 437.

The following recitals are parts of the bill of lading:

Par. 6. "The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said Company before said stock has been removed from the place of destination or mingled with other stock."

Par. 9. "The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said Company, to which the said property may come for purpose of transportation."

A rehearing was denied by the Supreme Court of Montana in this brief order: "Appellant's motion for a rehearing herein heretofore submitted is after due consideration by the court denied." An elaborate written argument filed there in support of the petition and incorporated in the record, states:

"Appellant did not brief nor argue the reasonableness of the provisions of paragraph 6 of said contract from the view point considered by the court on page 3 to line 5 of page 7 of the opinion, for the reason that no such question was raised by the plaintiff in the court below. In fact the only grounds upon which the defendant attacked said provisions of the contract in his answer was that it 'is unreasonable, unjust, burdensome against the policy of the law and contrary to the express provisions of chapter 138 of Session Laws of the State of Montana for 1909.' Not until his brief was filed in this court did such question appear in the case.

"In view of the provision of paragraph 9 of the contract, also of plaintiff's position in the court below, and of the fact that the defendant company has always considered that a notice served upon 'some officer or station agent' of the connecting carrier at point of delivery in the manner required by paragraph 6 of the contract, was a sufficient

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notice to show a compliance with such provision in an action brought against the initial carrier, we did not consider the question as presented for the first time in respondent's brief of any importance and did not even reply thereto in our oral argument.

"Under section 9 of said contract the terms and conditions thereof inure to the benefit of the connecting carrier. Therefore, such notice should be given to some officer or station agent of such carrier at point of delivery when damages are claimed.

"The importance of this is apparent when considered in connection with the Carmack Amendment to the Interstate Commerce Law."

The only ground for reversal now seriously relied upon is that the Carmack Amendment (June 29, 1906, § 7, c. 3591, 34 Stat. 584, 593) made "the connecting carrier, and therefore its agents, the agents of the initial carrier," and consequently the court below wrongly held, because no officer or station agent primarily employed by Northern Pacific Railway was shown to have been in Chicago, paragraph six was unreasonable and inoperative, and notice to a Burlington agent would not have been effective for any purpose. I fail to find that this point was definitely raised at any stage prior to the application for rehearing; and counsel for the railroad below seem to have been equally unsuccessful. If they had already wittingly relied upon it, they would hardly have burdened their argument for rehearing with an excuse for failure so to do. Former opinions imperatively demand that the foundation for our jurisdiction be laid in plain view and not around a corner where only an esoteric eye can detect it. *Seaboard Air Line v. Duvall*, 225 U. S. 477, 487.

*Second.* "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the com-

panies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in *National Bank v. Insurance Co.*, 95 U. S. 673, 679: 'Both reasonable and just that its own words should be construed most strongly against itself.'" *Tex. & Pac. Ry. v. Reiss*, 183 U. S. 621, 626.

Apparently the bill under consideration followed a form adopted before passage of the Carmack Amendment or at least before this was adequately understood. It is dated "Belgrade, Montana, Station, January 2, 1912," purports to be an "agreement, made the day above stated between the Northern Pacific Railway Company, hereinafter called the 'Company,' and R. J. Wall, hereinafter called the 'Shipper,'" and contains, in addition to paragraphs 6 and 9 copied above, the following ones:

Par. 7. "It is further agreed and provided that no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be sustained by any court against said Company unless suit or action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said Company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding."

Par. 8. The "said Company shall not be liable for the non-delivery or loss of, nor for injuries suffered by any of the stock beyond the line of its own railroad."

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McREYNOLDS, J., dissenting.

Commenting on paragraph 6, the Supreme Court of Montana said (50 Montana, 127):

"If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of the Northern Pacific Company. Notice to an agent of the Burlington road would not have been effective for any purpose. The *company* mentioned in paragraph 6 is defined by the preamble to the contract to mean the 'Northern Pacific Railway Company.' Furthermore, if this provision is valid, it must be so construed as to serve some purpose. Its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made or a reasonable time therefor had elapsed. By the facts before us the reasonableness of the provision is to be tested. The contract is silent upon the question of service of the notice. If personal service was necessary, the shipper was required to hold the cattle at the Union Stock Yards until he could find an officer or station agent of the Northern Pacific Company. No particular officer or station agent is designated, and if this provision is to be taken literally, the shipper was required at his peril to assume the burden of finding some person who answered the description given. There is not a suggestion in the contract, in the pleadings or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of its road—more than 400 miles away. If service could have been made by mail, plaintiff would have been in no better position, though doubtless a letter written to the station agent at Belgrade, and mailed postpaid at Chicago, would have sufficed for a literal compliance with the terms of this provision. But in any event, plaintiff would have had to bear the burden of keeping his cattle on the cars or in the Stock Yards until the notice had been received and a reasonable time for inspection

had elapsed. If the paragraph in question be construed to mean that a written notice mailed from Chicago to any station agent of the Northern Pacific Company, even the agent at Seattle, would suffice, it is senseless. If it is construed to mean that the shipper should travel from Chicago to St. Paul and make personal service of the notice upon an officer or station agent of the Northern Pacific Company, then it is unreasonable to the point of being unconscionable. Whether the company had an officer or station agent at Chicago—at a point where it has no road—upon whom service of this notice could have been made, was a matter peculiarly within its own knowledge, and for this reason the burden was upon it to make proof of such fact."

Manifestly its language has given rise to a very grave doubt; therefore I think the contract should be construed most strongly against the company and with a view to preserve shipper's rights. The construction placed upon paragraph 6 by the state Supreme Court, when sitting within surroundings designed to stimulate clear thinking, is diametrically opposed to the one now adopted. In such circumstances it appears to me hardly reasonable to say that a stockman at a wayside Montana station was bound instantly to apprehend the true interpretation, notwithstanding any mental quickening which he may have received from a "rough wind" and a modest thermometer pointing to only "seven or eight degrees below zero."

I am authorized to say that MR. JUSTICE MCKENNA concurs in this dissent for the second reason stated.